

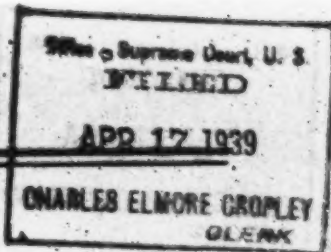
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1938.

No. 221.

THE UNITED STATES OF AMERICA and the
SECRETARY OF AGRICULTURE,

Appellants,

against

O. MORGAN, doing business as F. O. MORGAN
SHEEP COMMISSION COMPANY, *et al.*,

Appellees.

BRIEF FOR APPELLEES UPON
REARGUMENT

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JOHN B. GAGE,
THOMAS T. COOKE,

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SECRETARY OF AGRICULTURE,

Appellants,

against

F. O. MORGAN, doing business as F. O.
MORGAN SHEEP COMMISSION COMPANY,
et al.,

Appellees.

No. 221

**BRIEF FOR APPELLEES UPON
REARGUMENT**

OPINION BELOW

The opinion upon the order appealed from (R. 200-203), which was made and entered June 18, 1938, appears at R. 248 and is reported in 24 F. Supp. 214.

JURISDICTION

On October 10, 1938, this Court noted probable jurisdiction and postponed consideration of the motion to dismiss or affirm to the argument on the merits. The Government relies for jurisdiction upon Section 47a, Title 28 U. S. C. (Act of October 22, 1913; c. 32, 38 Stat. 220), which Section 318 of the Packers and Stock Yards Act,

1921 (7 U. S. C. § 217) makes applicable. Section 47a permits a direct appeal to this Court only from a "final judgment or decree" of the statutory court.

It is our contention, previously argued in Point I of our brief in opposition to application of appellants for a stay and supersedeas pending appeal and in Part Two of our brief upon the original argument, that the appeal is not from a "final judgment or decree", but from a ministerial order appurtenant to the liquidation pursuant to its terms of a temporary restraining order, which as this Court's decision in *Morgan v. U. S.*, 304 U. S. 1, 23, setting aside as invalid an order of the Secretary of Agriculture, has conclusively shown, was providently issued.

STATEMENT

On April 7, 1930 the Secretary of Agriculture instituted *on his own motion* an inquiry into the "reasonableness and lawfulness of all rates and charges * * * of the respondent market agencies at the Kansas City Stockyard, Kansas City, Missouri (most of which are appellees upon this appeal) * * * as set forth in their tariffs and supplements thereto" as "*theretofore filed*" with him (R. 21).

On June 14, 1933 the Secretary entered an order commanding the market agencies on and after thirty days from said date to cease and desist from publishing or collecting charges in excess of those prescribed in said order, and to publish and file with the Secretary, as required by the Packers and Stock Yards Act, a schedule of charges conforming to those prescribed by the Secretary's order as just and reasonable for the future, within ten days prior to its effective date (R. 94-95).

His order did not direct payment of reparation on past shipments. *The statute expressly forbids the Secretary from making any order for the payment of money in any proceeding instituted before him on his own motion* (Packers and Stock Yards Act, Sec. 309 (c)).

On July 5, 1933 the appellees petitioned for rehearing, which was denied on July 6, but the effective date of the Secretary's order was extended to July 24, 1933 (R. 3, 131).¹

On July 19, 1933 each of the market agencies brought a separate suit to set aside the Secretary's order, all of which suits were subsequently consolidated for trial. On July 22, 1933, a temporary restraining order was entered in each of said separate causes restraining the enforcement of the Secretary's order until further order of the Court (R. 129), conditioned in each of said causes upon the impounding of the difference between the market agency's old charges, continued in effect by the restraining order, and the charges fixed in the order issued by the Secretary, "pending final disposition of this cause" (R. 130). These temporary restraining orders were continued in effect until the simultaneous denial of temporary and permanent injunctions, and the restraint, so conditioned, was renewed pending appeal (R. 130, 171, 181).

On November 25, 1933, some four months after the commencement of the suits, the appellants answered (R. 31). The case was submitted before the summer adjournment. Final decree dismissing the bill was entered on De-

¹On November 1, 1937 the Secretary's order of June 14, 1933 was superseded by another order made in the same proceeding by which other and higher rates to be thereafter charged were approved (R. 193).

ember 20, 1934 (R. 137). Drawn by the Government, it recognized that the impounded funds were deposited as security only and belonged to the market agencies subject to the obligation to refund equivalent amounts to the shippers. Petition for rehearing was promptly filed (R. 168) but denied on June 29, 1935 (R. 171). Appellees promptly appealed to this Court, which in an opinion rendered on May 25, 1936 reversed by reason of error committed by the District Court in striking from the petition, at the instance of the Government and the Secretary, allegations that the Secretary himself neither heard nor read the evidence, nor was familiar therewith, but relied for his judgment upon findings made by his subordinates without permitting the market agencies any opportunity to argue with respect thereto. *Morgan v. U. S.*, 298 U. S. 468. Upon a retrial the Court below (Judge Van Valkenburgh dissenting) again dismissed the bill, holding that the appellees had been accorded a full and fair hearing (R. 180, 241). From this decree the appellees promptly appealed (R. 181).

This Court reversed on April 25, 1938 and denied a rehearing on May 31, 1938. *Morgan v. U. S.*, 304 U. S. 1, 23. On June 18, 1938 the District Court set the Secretary's order aside, pursuant to the mandate of this Court (R. 203, 172). Prior thereto appellants had moved to stay the distribution of funds impounded under the restraining order until after further proceedings by the Secretary, and subsequent determination by the Court of the validity of any new order which the Secretary might make (R. 184). On June 18, 1938 the District Court denied the appellants' motion to stay the distribution of the impounded funds and granted the appellees' motion for release of the impounded funds (R. 200) in a *per curiam* opinion (R. 248).

It is from the order of release and it alone that an appeal has been taken to this Court (R., 205). Appellants have not appealed from a denial of their motion to stay distribution.²

²We have recited the course of the proceedings previously had because there is at least a veiled intimation in the brief of the appellants that the appellees are responsible for the delay by reason of which there has been no determination by public authority of the reasonableness of the rates being charged by the agencies at the time of the entry of the Secretary's order on June 14, 1933.

During the entire course of the litigation over his order, the Secretary overlooked no opportunity to interpose technical obstacles to the ascertainment of the truth which eventually came out and resulted in the invalidation of his order. First, he moved to strike the allegations in our petitions, the granting of which motion caused his defeat upon the first appeal (R. in No. 581, Oct. Term, 1937, I, 129). He opposed amendment of our petitions, and was overruled (R. 177). He filed eighteen pages of objections to our interrogatories addressed to himself and moved to strike them although they were clearly authorized by the Federal Equity Rules, and was overruled. He was ordered to answer the interrogatories on December 23, 1936 and did not answer them until March 3, 1937. When, however, he desired to take his own deposition and that of Judge Seth Thomas, the market agencies immediately consented.

On this record, the suggestion that the appellees are responsible for the delays which have resulted from this litigation is wholly without merit.

The suggestion that it is the appellees who have prevented the Secretary from determining at an earlier date what were the reasonable charges to be made by the market agencies for their services is equally without merit. In their original petitions filed within a little more than one month after the entry of the Secretary's order, the order's validity was challenged upon the ground that a full and fair hearing had been denied for the reasons heretofore given (p. 4). As appears from his own evidence on his own direct examination in his own deposition on the retrial, taken by his own counsel, the Secretary knew these facts to be true at the time that the appellees' suits were brought. (R. in No. 581, Oct.

On the first trial in the District Court, a majority of the Court in an opinion by Judge Otis on December 29, 1934 (R. 230) sustained the validity of the Secretary's order, and in so doing adopted the Secretary's Findings of Fact as those of the Court (R. 236). Judge Van Valkenburgh, while concurring in the result because of what he conceived to be the limitations upon the Court's powers in reviewing the Secretary's findings, thought that they would be against the weight of the evidence were the Court free to weigh the evidence (R. 237-239).

On petition for rehearing, Judge Van Valkenburgh, again reviewing the Secretary's findings, stated his own conclusions in the language of Judge Wilkerson in the *Acker* case, as follows:

"I do not concur in the findings of This Court, which adopt in toto the findings of fact made by

Term, 1937, II, 1170-1174.) Instead of thereupon voluntarily setting aside his order and according to the appellees, as was their right, that full and fair hearing which the statute requires, he moved to strike these allegations from the petition.

This Court's decision on the first appeal was handed down on May 25, 1936, two years before entry of final decree setting the Secretary's order aside as the result of the second appeal. This Court at that time advised the Secretary and his counsel as to the essential requirements of a full and fair hearing. Appellees amended their petitions to set the order aside to raise more precisely the questions of fact suggested by the Court's opinion (R. 174). Instead of admitting these allegations of fact, all of which were in substance true, as the Secretary and his counsel must have known at the time, the Secretary again denied them and joined issue (R. 177). If, therefore, there has been any delay in the Secretary's exercise of the powers conferred upon him by the statute, in the manner required both by the statute and by due process of law, the appellees are not responsible for such delay, which may be laid solely at the door of the Secretary himself.

the Secretary of Agriculture. Some of them, particularly those relating to salesmanship costs and allowances for business getting and maintaining expenses, are, in my opinion, against the weight of evidence. However, I am not prepared to say that the findings were made without any evidence to support them. I join, therefore, in the entry of the decree dismissing the bill" (R. 241).

Of this the third member of the Court, Judge Reeves, said, "I fully concur in the foregoing Memorandum" (R. 241). The effect was thus to reject as the findings of a majority of the Court those made by the Secretary.

On the second trial the issue chiefly dealt with in the majority opinion of the District Court was that raised for the first time thereon, to wit, the sufficiency of the hearing, which, as heretofore stated, the Court below deemed sufficient, Judge Van Valkenburgh dissenting. In respect of the other issues in the case, the Court speaking through Judge Otis merely said (R. 246):

"We have reached the same conclusions on the merits as to the facts and law as those heretofore announced and we incorporate them herein by reference."

The conclusions theretofore announced were those contained in the Court's original opinion, on the first trial, as modified on rehearing, and were:

(1) That one member of the Court (Judge Otis)³ was of the opinion that the order was not only free

³Since prior to this opinion this Court had decided *Acker v. United States*, 298 U. S. 426, which definitely held that a court was not empowered to weigh the evidence in a case like this because no question of confiscation was involved, Judge Otis probably meant only that he thought that the Secretary's findings were supported by substantial evidence.

from attack on the only grounds on which it is open to attack in court, but that the findings were supported by the weight of the evidence and adopted them as his own, but

(2) That the other two members of the court (Judges Van Valkenburgh and Reeves) were of the opinion that essential and important findings going to the intrinsic reasonableness of the rates were against the weight of the evidence, but that since they were supported by some evidence, the Court was powerless to set them aside.

On this state of the record the statement in the Government's brief that the findings embodied in the Secretary's order⁴ had been twice concurred in by the court below is

⁴Although constantly referred to in the Government's brief as the Secretary's findings, they were not his findings but those of the "active prosecutors of the Government", as this Court held on the second appeal.

We have set forth at this length the facts concerning the District Court's opinions because of the constantly reiterated statement in the Government's brief that every available indication points to the unreasonableness of appellees' charges and the reasonableness of the Secretary's invalidated rates, a statement based largely on the supposed concurrence by the Court in such findings. We do not assume that the obligation of the Court or the power of the Secretary to take the action requested by the Government will or may turn upon the presence or absence of any indications as to the reasonableness or unreasonableness of appellees' charges or the Secretary's invalidated rates. If such be the issue, then, for the reasons set forth in the appellees' briefs on prior appeals in this Court (No. 686, Oct. Term, 1935; No. 581, Oct. Term, 1937), and by reason of the facts hereinafter stated, we think that every available indication is that the Secretary's invalidated rates are unreasonably and ruinously low, unjust in the extreme to the market agencies, and that the charges of the market agencies in no wise bore unjustly or unfairly upon the farmers (see Point XI, pp. 142-152, *post*).

not only without support in the record, but would appear to be directly contrary thereto.

The appellants' motion to stay the distribution of the impounded moneys did not allege that the appellees at any time during the impounding period collected any unreasonable charges from the shippers or that the charges collected from the shippers, including the amounts impounded, were unreasonable or unjust.⁵ Their motion was

⁵Appellees had filed their verified reply to this motion on June 11, 1938, praying an order denying and overruling defendants' motion (R. 188-194). They alleged that the funds in the Registry of the Court were the sole property of the appellees and that no undetermined issue in this case was before the Court. (*Illinois Bell Telephone case*, C. C. A. 7th, decided Feb. 22, 1939, and unreported.) It set forth that the charges collected during the period of impounding were lower than the maximum rates prescribed as reasonable by a prior valid order of the Secretary of Agriculture made upon complaint and after full hearing; that in no subsequent proceeding had the Secretary of Agriculture, after full hearing, by valid order, determined that these rates and charges were unreasonable, and that as actually collected by plaintiffs the said rates were the legal rates which plaintiffs under the Act were required to and did collect. The reply also alleged that a majority of the statutory court in an opinion rendered on the twentieth day of June, 1935, had found that the Secretary had departed from the methods employed in previous like cases in connection with the making of the purported order; that the drastic reduction in advertising and other costs made by the purported order gave "scant consideration to the reasonable necessities of the situation" and that "the effect of the methods employed might, as suggested by the petitioners, tend to weaken and to ultimately destroy the market by diverting business to more favored markets and agencies" and might tend "further to the undue restriction of agencies enabled to operate profitably with the result injurious not only to the Kansas City live stock market, but equally to the shippers of stock conveniently patronizing it".

It was further alleged that a large number of petitioners had already been compelled to discontinue business by reason

based wholly upon the allegation that the Secretary had reopened the proceedings before him, and that "after full hearing the Secretary will determine by an order as of June 14, 1933, what rates may be reasonably charged by petitioners to their clients for the services rendered them" (R. 185), and prayed that the funds be retained in the possession of the Court until the Secretary should have entered such an order and "such order shall have become effective or its merits have been finally adjudicated by a court of competent jurisdiction" (R. 186).

In its opinion denying the appellants' motion and granting that of the appellees, the District Court held, and we think without question properly (1) that in view of the purpose and terms of the restraining order the appellees were entitled as of right to have the impounded funds released; (2) that the Secretary was without authority to enter a *nunc pro tunc* order fixing rates as of June 14, 1933, the only ground upon which distribution of the funds was sought to be stayed (R. 248).

THE STATUTES INVOLVED

The powers of the Secretary of Agriculture are both defined and limited by Title III of the Packers and Stock

of the impoundings required during the period of the pendency of this case and prior to the adjudication of said order as invalid, and others of petitioners continuing in business had suffered financially by reason of such situation to an extent which might, unless said funds were immediately restored to them, impair their ability to render efficient service in connection with the sale and purchase of live stock as required by the Packers and Stock Yards Act.

No reply to this verified pleading of the appellees was filed by the appellants, and the facts alleged therein stand admitted for the purposes of this appeal.

Yards Act, 1921 (42 Stat. 159, 7 U. S. C. c. 9, sections 181-229). The jurisdiction of the District Court is defined by Section 316 of said Act, which makes the provisions of the Urgent Deficiencies Act (38 Stat. 220, Title 28 U. S. C., Sections 44, 47 and 47a) applicable to cases brought to set aside orders made under the Packers and Stock Yards Act. The Urgent Deficiencies Act and Title 28, Section 382 of the United States Code (38 Stat. 738) set forth the circumstances under which a temporary restraining order or temporary injunction may be issued and the terms upon which it shall be conditioned. Section 47a of the Urgent Deficiencies Act contains the applicable provisions governing the appellate jurisdiction of this Court.

The pertinent provisions of these several statutes are set forth in full in the Appendix.

SUMMARY OF ARGUMENT

I

The moneys impounded in the court below were impounded for the specific purpose of providing security to the shippers in the event the Secretary's order should be held invalid by this Court. This is shown not only by the terms of the temporary restraining orders, as a condition of the issuance of which the impounding was ordered, but by the circumstances under which they were entered, the explicit declaration of the statutory court as to its purpose in requiring the condition, and the express terms of the statute (Title 28 U. S. Code, § 382) governing the giving of security in connection with the obtaining of restraining orders and injunctions, which statute provides

that security shall be given for damages caused by the erroneous or improvident issue of the restraint.

The Secretary's order having been held invalid by this Court, and the court below having entered its final decree permanently enjoining the enforcement of that order, its action in determining to release the impounded funds to appellees should be affirmed. There is no warrant for reading into the temporary restraining orders a condition not intended to be imposed by the Court and which, in fact, it would have had no power to impose, in order to retain the impounded funds for an indefinite period pending the making of a new rate order by the Secretary to take effect *nunc pro tunc* as of June 14, 1933. The "causes", pending the disposition of which the moneys were required to be impounded, were the causes in court brought to set aside the Secretary's order as invalid, and this expression cannot be construed to include a subsequent quasi-legislative proceeding before the Secretary of Agriculture which may or may not result in new causes in court. The administrative proceeding and the proceedings in court, now concluded, are independent of each other and the relationship between such proceedings is not analogous to the relationship between proceedings in a lower court and in an appellate court (Point I, pp. 23-35).

II

When the statutory court, pursuant to the mandate of this Court, set aside the Secretary's rate-fixing order and permanently enjoined it, there remained no "case" or "controversy" or justiciable issue in the court below. There was, therefore, no proceeding capable of judicial cogni-

zance in which the stay of the distribution of the impounded funds requested by the Government could issue. The only possible justiciable issue suggested by appellants has to do with the reasonableness of the charges collected by the market agencies during the impounding period. This, however, is an issue which under the Urgent Deficiencies Act could not have been raised in the proceeding to set aside the Secretary's order and was not raised. It cannot, therefore, be imported into the case at its conclusion. It is, moreover, a legislative question, being a matter of discretion and not of law, and is not appropriate for determination by the Court. Appellants confuse this case with a restitution case arising from the improvident action or failure to act of a court. No such situation obtains here. Since no other "case" or "controversy" has been suggested, the order of the statutory court should be affirmed. Even, however, were it otherwise with respect to the existence of a "case" or "controversy", the motion of appellants did not present to the statutory court any justiciable issue in that no allegation was made that the market agencies ever charged any unreasonable rates (Point II, pp. 36-42).

III

Nothing that the Secretary can do in his reopened quasi-legislative proceedings brought on his own motion can in any way affect the disposition of the impounded funds by the Court, since the Secretary has no power under the statute to make a *nunc pro tunc*, pre-dated or retroactive order. The statute expressly confines him in such a proceeding to the making of rates "to be thereafter observed", which can only be done "after full hearing" (Sec. 310). Damages

may be awarded to a shipper on account of unreasonable charges made to him in the past only upon express complaint from the shipper filed within 90 days after his cause of action arose (Secs. 308 and 309). No order for the payment of money may be made upon the Secretary's own motion (Sec. 309c). Even a court cannot make a *nunc pro tunc* order except when the order could properly have been made at the time to which it is related back. The sole legitimate purpose of such an order is to correct the record so as to make it speak the truth as to the order which was actually made. The power is to be exercised to correct clerical, not judicial, errors. The Secretary's power is even more limited because it is expressly controlled by the terms of the statute previously referred to. On the Secretary's own theory he was, on June 14, 1933, in the middle of a hearing. No order can be made now to be dated as of a time five years ago, when the administrative proceeding was concededly incomplete. The Secretary can make no order now which he could not have made then. The findings contained in the order of June 14, 1933, were made by the "active prosecutors for the Government" and the market agencies, as this Court has held, were given no opportunity to argue in refutation thereof (304 U. S. 1, 23). It is wholly untenable to suggest that, by a readoption of these findings after hearing at this time, the Secretary may date them back to the date of the old order before hearing. Contrary to the claim made by appellants, the Secretary's order will be retroactive and intended to be. This retroactive effect cannot be escaped from by attempting to identify the Secretary's order with that of the Court, which, it is argued, must be compelled to adopt it. There is no analogy between

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the order which the Secretary proposes to make and legislation of limited retroactive effect or in ratification of the technically defective acts of the executive. Congress or a State legislature may act without hearing at all because, in theory at least, representative of the will of the people. The Secretary is the mere delegate of Congress and can validly act only in strict accordance with the statute which prescribes a "full hearing". His acts are a nullity unless he complies with all conditions precedent (Point III, pp. 2-54).

IV

Any power which the Secretary may have ever had to determine the reasonableness of the appellees' charges, a matter put in issue by the proceeding in which his invalid order of June 14, 1933, was made, is now exhausted. This is so because on October 14, 1937, while the litigation over the validity of his order of June 14, 1933 was still going on, the Secretary reopened the administrative proceeding and authorized the market agencies to file new and higher rates to become effective as of November 1, 1937. The question, therefore, as to whether the rates of appellees under investigation were reasonable has become moot. In the reopened proceedings before the Secretary, the only power which he could exercise would be to establish by order the charges "to be thereafter observed". Such an order may be entered only if the Secretary "is of the opinion that any rate, * * * of a * * * market agency, for or in connection with the furnishing of stockyard services, * * * or will be unjust, unreasonable, or discriminatory, * * *" (Section 310). Were the Secretary proposing, as he is not,

to make rates for the future, he would thus be compelled to determine whether the rates which became effective November 1, 1937, and are now in effect, are or will be, in the future, unreasonable. No issue as to the reasonableness of the rates which they superseded would be involved. Nothing that he can do in this proceeding can, therefore, in any way affect the impounded funds (Point IV, pp. 55-58).

V

1. The Government's contention that the Court should mold the statute to effectuate the so-called substantive provisions of the statute by permitting the employment of an extraordinary remedy not provided for therein is without support in the statute itself, contrary to the legislative policy of Congress as embodied in the Act and repugnant to settled principles of administrative and constitutional law. It is plain that the remedies provided in the statute are exclusive. The charge of unreasonable rates in the past must be specifically complained against within the statutory time and the Secretary cannot, upon his own motion, award reparation. Such power has been expressly withheld. Nor can he accomplish the same result by a *quacuncumque* order in a quasi-legislative proceeding, for the statute expressly prohibits his so acting.

The prior decisions of this Court in this case constitute a complete answer to the distinction attempted to be made between the effect of substantive and so-called "procedural" errors. As this Court said, the refusal of the Secretary to grant a full and fair hearing was a "vital

defect" and "more than an irregularity in practice" (304 U. S. 1). To permit the Secretary to now cure this "vital defect" by a *nunc pro tunc* order not only would be to override the express statutory limitations upon the exercise of the Secretary's powers but would be repugnant to fundamental requirements which go "to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the legislature" (304 U. S. 1). If denial of such rights may be corrected by *nunc pro tunc* orders, a high premium is put upon snap judgment and the right of respondents to fair and impartial determination by an officer or tribunal approaching the case with an open mind is effectively destroyed. It would, in fact, as a practical matter, prevent any effective contest of administrative orders because such orders could always be corrected *nunc pro tunc* no matter how many proceedings might be necessary for the purpose.

Not alone could correction be made of so-called procedural errors but also of any other. The result would be a denial to respondents of their most important substantive right, not to be deprived of their property or liberty of action, or both, without warrant of law.

2. The provisions of Section 305 of the Packers and Stock Yards Act are not self-executing. The sections dismissed by the Government as merely procedural are as much a part of the legislative scheme as is the requirement of just and reasonable rates. It would be wholly repugnant to the constitutional doctrine of separation of powers as between the legislative, executive and judicial departments of the Government for this Court to evolve additional and

substitute "procedural mechanisms" to implement further the substantive requirements of the Act. The charges in schedules required to be filed by the market agencies pursuant to Section 306 of the Act must be collected under pain of civil and criminal penalties until duly and legally displaced by order of the Secretary. The provision for just and reasonable rates in the statute means just and reasonable rates to the market agencies as well as to the shippers. Examination of the Act as a whole demonstrates clearly that by the enactment of Section 305 Congress did not intend to confer substantive rights either upon the shippers or upon the market agencies to be enforced and made effective at every moment of time—whether before or during the pendency of proceedings before the Secretary or in court—but only in the manner and subject to the limitations imposed by the so-called procedural sections of the Act, by which alone the substantive requirements would be effective.

3. The Government's complete misconception of the legislative policy of Congress end of the relationship between the substantive and so-called procedural provisions of the Act is further demonstrated by a consideration of the Interstate Commerce Act and its legislative and judicial history over a period of more than fifty years, upon which Act the Packers and Stock Yards Act was modelled. The legislative history of the amendments to the Interstate Commerce Act makes it unmistakably plain that in respect of that Act it was, from the beginning, the purpose of Congress that its substantive requirements should be effectuated only by the means prescribed and subject to the limitations imposed by its procedural provisions, and in no other

manner. The history of these amendments discloses that in adopting them Congress recognized that procedural deficiencies could be cured only by statute, and that where such deficiencies existed, its substantive provisions could be effectuated only by altering the "procedural mechanism" by statutory enactment.

4. The failure of the Interstate Commerce Commission to recommend or of the Congress to provide for any such supplementary remedy as now proposed during the fifty years of experience with the Interstate Commerce Act from which the Packers and Stock Yards Act was copied, is persuasive, if not conclusive, that none such was intended (Point V, pp. 59-99).

VI

The analogy to court proceedings, far from supporting the Government's contentions, supports those of the appellees. There is, properly speaking, no "cause of action" in a quasi-legislative proceeding as there is in a proceeding in court. Upon judicial review of a quasi-legislative order, the reviewing court does not order a new trial or give directions to an administrative tribunal. That tribunal is free to act as it pleases, subject to having its orders set aside in the courts if not in compliance with law. When a new trial is ordered in court the judgment is entered as of the date of its rendition—not as of the date of the judgment previously set aside. But this kind of a judgment or order—the only kind a court may enter—advances the Government nowhere. The power of a law or equity court to award damages for the past inheres in its exercise of the judicial power. The Secretary, however, can award

damages for the past only in accordance with the statute which prohibits his doing so upon his own motion (Point VI, pp. 100-104).

VII

The authorities cited by appellants do not support their position (Point VII, pp. 104-116).

VIII

The Court had no power to condition its temporary restraining orders in such a way as to fix reasonable rates during the impounding period. Not having done so, it follows *a fortiori* that it cannot be compelled to now fix them retroactively (Point VIII, pp. 116-123).

IX

The Court and the Secretary acting in cooperation cannot, by attempted joint action, exercise powers not possessed by either. The statutory court has no supervisory or appellate administrative jurisdiction. Litigation begins where legislation ends, and courts and administrative agencies of the Government are thus compelled by the action of Congress, if not by the Constitution, "to regard each other as things apart". Each must recognize the rights of the other in its own sphere, but neither may act within the sphere of the other, delegate to the other any part of its own power, confer upon the other any power not conferred upon it by Congress, or, in cooperation with each other, exercise powers not conferred upon either. Any order which the Secretary may make in the reopened proceedings

before him will be quasi-legislative and not quasi-judicial in character.

Such an order cannot be *res judicata*, and can, therefore, have no binding effect in determining whether or not appellees' rates in the past were reasonable. The fundamental requirements of administrative procedure are simple and easily understood. There is no danger that the "far fetched demands of ingenious counsel" and the timidity of administrative agencies in dealing with them will interfere with the orderly course of administrative proceedings.

If, however, administrative tribunals may commit fundamental errors with impunity and correct them backwards, it is idle to suggest that even-handed justice will have been accorded to respondents before them. The fundamental requirements of a full and fair hearing must be met when they first are required to be met, and when the mind of the administrative officer or tribunal is open, if their essentials are to be preserved.

Neither the Court nor the Secretary, acting jointly with the other, may exercise power which neither acting alone could exercise. Nor may they, acting in cooperation, exercise the legislative power of adding to or supplementing the provisions of the Act itself, especially in a manner directly contrary to the limitations contained in such provisions (Point IX, pp. 123-128).

X

If the molding of the statute requested by appellants should be indulged in by this Court it is clear that the market agencies would be deprived of essential rights guar-

anted to them by the Constitution and the statute, while extra-statutory rights and privileges would be conferred upon the shippers. All of this, although to be done in the name of equity, would only succeed in producing a most inequitable result. The Government's theory would deny the market agencies an impartial trier of the facts, part of the inexorable safeguard of due process of law, since it would permit the Secretary to pass upon the question of whether or not and to what extent the appellees have been prejudiced by his refusal to accord them their fundamental rights. The Government's theory would also confer upon the Secretary the power, by a "snap order" and the subsequent validation thereof *nunc pro tunc*, to deprive market agencies of their rights to judicial proceedings before impartial judges and juries in actions for reparation.

The molding of the statute requested by appellants would provide for the shippers an attachment to which they are not entitled and without their giving any security therefor. It would be grossly inequitable for the Court to distribute the impounded funds in accordance with an order of the Secretary made *nunc pro tunc* as of June 14, 1933. The acceptance of appellants' contentions would result in a dangerous extension of the Secretary's already great power to fix maximum wages (Point X, pp. 128-141).

XI

Every available indication is that appellees' rates were reasonable, and no miscarriage of justice suggests or requires the improvisation of an extra-statutory remedy (Point XI, pp. 142-152).

ARGUMENT**I**

UPON THE ENTRY OF THE FINAL DECREE SETTING THE ORDER OF THE SECRETARY ASIDE, THE APPELLEES BECAME ENTITLED, UNDER THE TERMS OF THE RESTRAINING ORDERS AND IN VIEW OF THE PURPOSE FOR WHICH ENTERED, TO HAVE THE IMPOUNDED FUNDS RELEASED.

If, by reason of the purpose of the restraining orders as shown by their terms and the circumstances under which they were issued, the appellees are now entitled to have the impounded funds released because the purpose for which they were impounded has been fully satisfied, then the order directing their release should be affirmed, whether the District Court might have required the funds in question to have been impounded for some other or different purpose or not.

We think it admits of no doubt, as held by the Court below, that the funds were impounded as security for damages, as required by Title 28, Section 382 of the United States Code, in the event it should turn out that the restraining orders had been improvidently or erroneously issued, and for no other purpose. There is, we think, no warrant for reading into the impounding orders a further and unexpressed condition that the funds should be held not only to abide determination of the validity of the Secretary's order—which alone was the subject matter of the causes in which they were entered—but to abide as well the determination of the validity of some subsequent order which the Secretary might or might not make if the challenged order

should be set aside. So to have conditioned a restraining order or temporary injunction would, to say the least, have been extraordinary and unusual, if not, as we think, beyond the authority of the Court. Had such been the purpose, it should and doubtless would have been clearly expressed. The Court below, whose orders they were, not only said that such was not its purpose, but that now to import into its orders such an unexpressed condition would be an act of bad faith upon the part of the Court itself (R. 249).⁶

Moreover, were the orders ambiguous—which we think they clearly are not—it is respectfully submitted that this Court should accept the statement of the Court below as to its intent, unless clearly at variance with the language of the

⁶In this connection the Court said:

"We consider that the motion of defendants has not the faintest shadow of merit. The Supreme Court twice has said that the order of June 14, 1933, was invalid. Pursuant to the mandate of the Supreme Court this court permanently has enjoined enforcement of that order and has dissolved the restraining orders heretofore issued. The fund in the Clerk's custody belongs to petitioners. It was deposited by them as security that if the Secretary's order of June 14, 1933, should be held valid those from whom excess charges had been collected would be reimbursed. The fund was deposited upon the clear understanding that if the order should be held invalid and its enforcement enjoined the fund would be returned to petitioners. The orders under which the fund was accumulated are susceptible of no other interpretation.

"If this Court did not now order the return to the petitioners of the moneys deposited by them the Court itself would be guilty of bad faith. The petitioners deposited the moneys on the understanding and assurance that the fund so created would be returned if the Secretary's order were held invalid. The order has been held invalid and its enforcement enjoined."

orders themselves, since that Court alone is capable of stating what its intent and purpose were. Court orders and decrees, like contracts, should be construed so as to give effect to the intent of those by whom made, unless violence is done to their express terms by so doing. It may be said, as was suggested from the bench at the previous argument, that this Court is as capable of construing the orders as is the Court below. But this statement we think is necessarily subject to some qualification. If the District Court's interpretation of its own orders were clearly repugnant to their express terms, it would be entitled to little or no weight. But it clearly is not. On the contrary, the Government points to no provision in the orders themselves which lends any substantial support to its position. It would have this Court read into the orders of the District Court a condition which is not only not contained therein, but which that Court has said it did not intend to impose. This, it is respectfully submitted, this Court should not do, except for the most cogent reasons drawn from the terms of the orders themselves, the circumstances under which entered, or the statutory requirements governing and limiting the issuance of temporary restraining orders by the District Courts. No such reasons exist. On the contrary, when these factors are considered, either separately or together, it is, we think, plain that the Court below was right in directing that the impounded funds be released.

The Urgent Deficiencies Act provides that no temporary restraining order or injunction shall issue except upon a finding of irreparable injury (28 U. S. C. § 47). As set forth in the statement a separate suit was brought by each of the market agencies and a restraining order, identical in terms, was entered in each. The orders in question contain

such a finding, for which there was ample support (R. 129). It is not and cannot be contended that the orders were improvidently issued or improvidently continued in effect during the litigation. Since the Secretary's order has now been held to be invalid, it cannot be asserted that it was wrongfully restrained *pendente lite*. Under the Packers and Stock Yards Act the charges of the market agencies named in their tariffs on file with the Secretary are required to be collected by them and paid by the shippers [Section 306 (f)] until displaced by others similarly filed [Section 306 (c)], or by a valid order of the Secretary prescribing rates for the future only, which may be made only "after full hearing" [Section 310]. Had the Secretary's order been permitted to become effective *pendente lite*, but set aside on final hearing, the market agencies would have suffered irreparable injury. On the other hand, if stayed *pendente lite* but sustained on final hearing, the shippers would have suffered damage by reason of its wrongful restraint.

The Urgent Deficiencies Act does not condition the granting of a temporary restraining order or injunction upon the giving of security. But Title 28, Section 382 of the United States Code, which is of general application, provides:

"§. 382. *Same; security on issuance of.* Except as otherwise provided in section 26 of Title 15, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby. (Oct. 15, 1914, c. 323, § 18, 38 Stat. 738.)"

This statute does not provide in what form security shall be given. Under well settled and accepted practice, security, where required, may be posted either by the giving of a bond or by the deposit of cash. In this case the Court provided for the latter by requiring the excess over the Secretary's rates to be impounded as collected "pending final disposition of this cause". It is plain that the restraining orders were framed to meet the statutory requirements, which are (1) a finding of irreparable injury; and (2) the giving of security for the benefit of those persons who might suffer damage by reason of the wrongful restraint of the Secretary's order. There is nothing in the restraining orders from which any other or further purpose may be inferred. On the contrary, it would appear from a fair reading of the orders themselves, as well as the circumstances under which entered, that such was their only purpose.⁷

After appropriate recitals of notice, etc., the Court by its orders finds "immediate and irreparable injury and damage will result to petitioner unless such Order (the restraining order) shall issue" (R. 129). In support of this general finding the Court further specifically found that unless the Secretary's order were stayed, the Secretary and others would

"proceed in derogation of the right of the petitioner to collect rates and charges for stock yard services rendered under the Schedule of Rates and Charges or tariffs now on file by petitioner with the Secretary of Agriculture, and that upon compliance with said order, the petitioner would be unable to collect from the users of its service the differences be-

⁷Indeed the Government itself has so construed them. See page 4, *ante*.

tween the rates fixed by the said Order of the Secretary and the rates prescribed in the Schedule of Rates and Charges now on file with the Secretary of Agriculture. *In the event the relief in said petition prayed was finally granted by this Court*, the amounts which petitioner alleges it is legally entitled to receive according to such established and filed rates and charges would be wholly lost to the petitioner, causing it loss from day to day in the State of Missouri, and plaintiff would be irreparably deprived thereof in violation of the Fifth Amendment of the Constitution of the United States" (R. 129).

By these recitals the Court clearly contemplated that if the relief prayed should be "finally granted" by the Court, each petitioner would be entitled to the collections accruing under the charges then on file, which during the pendency of the restraining order would be the only legal charges under the Packers and Stock Yards Act. The only relief "prayed" in "the petition" or which could be "finally granted" thereon was to set the order aside as invalid.

The Court accordingly temporarily restrained the defendants and all others from interfering with, abridging or performing any act in any wise militating against the right of each petitioner to

"collect, demand, *receive, and retain* rates and charges for stock yard services at the Kansas City Stock Yards in accordance with the Schedule of Rates and Charges of petitioner now on file with the Secretary of Agriculture" (R. 130).

Mindful, however, of the requirements of Title 28, Section 382 of the United States Code, the restraining orders were conditioned (R. 130) as follows:

"Provided, however, that the petitioner shall deposit with the Clerk of this Court on Monday of each and every week hereafter while this order, or any extension thereof, may remain in force and effect and pending *final disposition of this cause*, the full amount by which the charges collected under the Schedule of Rates in effect exceeds the amount which would have been collected under the rates prescribed in the Order of the Secretary, together with a verified statement of the names and addresses of all persons upon whose behalf such amounts are collected by petitioner."

Manifestly, this part of the orders, by which funds were required to be impounded, was inserted for the purpose of providing the security required by the Code to cover the damages which the shippers might suffer, if it should turn out upon the final disposition of the cause that the Secretary's order had been wrongfully restrained *pendente lite* because valid and enforceable. The orders contain no language from which any other or further purpose may be reasonably inferred.

It is said that the orders do not expressly provide for a release of the impounded monies to the market agencies by whom deposited, if they should prevail on final hearing. Neither do they provide that such monies be paid back to the persons from whom collected by such market agencies in the event of a dismissal on final hearing. What the orders do provide is that the funds shall be impounded "pending final disposition of this cause". Giving to these words the meaning in which they are customarily employed in court orders, pleadings, etc., it is plain that each order has reference to final disposition of the cause in the Court in which the order itself was entitled, *e.g.*, *Morgan v.*

United States, as in other cases where the expression "this cause" is used. To give it the interpretation insisted upon by the Government would be to give to it a meaning wholly inconsistent with the relative positions occupied and functions performed by a court, on the one hand, exercising the judicial power, and an administrative officer, on the other hand, proposing to exercise delegated legislative functions.

(That the Court used the words "this cause" in their ordinary sense is further supported by the fact that, while afterwards consolidated for trial, each market agency instituted in court a separate suit or cause of its own to set the order aside (R. 170). Since confiscation was charged by each, no omnibus bill could have been brought in behalf of all. There were thus pending in the Court not one cause but fifty-one separate causes, in each of which identical restraining orders were issued. These separate causes were *afterwards* consolidated and heard together for the purposes of trial, but each retained its own identity, a separate decree was entered in each, and separate appeals taken. True, they related to a single subject matter, but by the expression "this cause" the Court clearly referred in each case to the separate cause in which entered and not to the omnibus proceeding before the Secretary out of which each grew, to which all of the petitioners had been parties, which had terminated with the entry of the Secretary's order and over whose further course, if the order should be set aside, the Court had not and could not have any control.

This Court has held the Secretary's order invalid. Pursuant to this Court's mandate, it has now been set aside by a final decree of the District Court entered in each of the causes in which the Court had theretofore entered its order

for the impounding of the funds in question "pending final disposition of this cause". While the order was invalid, it was not subject to collateral attack, but only in a suit brought to set it aside in the manner provided in the Urgent Deficiencies Act. Such suits were brought. Up to that time there had been no cause pending in the District Court, and no judicial proceeding of any description whatever. There had been a quasi-legislative proceeding pending before the Secretary. That proceeding had been terminated by the entry of the Secretary's order. That order was the subject matter and the only subject matter of the several separate causes instituted by appellees in the District Court. In each of those causes the sole issue raised or which could be raised was the validity or invalidity of the Secretary's order. The reasonableness of the rates charged or to be charged, aside from the allegation of confiscatory effect, was not put in issue, and could not have been put in issue by the appellees' petitions to set the Secretary's order aside. That was a legislative question for the Secretary to decide. (See cases cited Point VIII, pp. 116-123, *post*.) Each of these "causes" in the District Court was instituted by the filing of an appellee's petition, and would terminate with the entry of a final decree.

Neither the pendency of the "cause" in the District Court nor its termination by final decree had or could have any effect upon the Secretary's continued control of the administrative proceeding before him, in which his order was made. He could, of his own motion, reopen it and make a new order at any time he chose, either before or after final decree. In 1937, when the causes in court were pending, he actually did reopen the administrative proceeding before him and entered a new order to be effective from

and after its date (R. 193). He has now undertaken to reopen it again. The Court is without power either to require or to prevent him from doing so or to give him any directions in respect thereof. He is an arm of Congress.

The attempted analogy to appeals in judicial proceedings breaks down at every point. When a "cause" in court is appealed, the lower court loses jurisdiction. It may not during the pendency of the appeal set aside or modify its judgment, or grant a new trial. In the exercise of its appellate jurisdiction the appellate court may reverse outright, modify the judgment below, remand with directions to grant a new trial, and otherwise direct and control the further action of the lower court. If judgment was for the plaintiff, the appellate court may reverse with directions to dismiss, thus putting an end to the case both above and below, or remand for a new trial. This is because there is but a single cause, and the several courts through which it may pass are but component parts of the same department of the Government having jurisdiction over that cause—the judicial.

But in a "cause" brought to set aside a legislative order of an administrative tribunal, the Court may not order the latter to dismiss the proceeding in which it was made, to reopen it, or in any other manner direct its further conduct. If it holds the order invalid, it does not direct its vacation by the tribunal which entered it, as in the case of an appeal from a lower court, but itself enters a decree setting it aside and enjoining its enforcement. Its orders act upon the administrative order *in rem* and upon the administrative tribunal *in personam*, not as directions to an inferior tribunal.

After an order has been set aside, the administrative tribunal is free to reopen the proceeding or not, as it chooses, and to enter a new order, subject only to the right of any party aggrieved by such new order to institute a new suit to set it aside. Such a suit, when brought, is not a part of the old cause in which the former order was set aside, but a new one. In such event, not only the cause but the subject matter is different, viz., the new order, although the subject matter of the administrative proceeding may be the same. These observations apply with especial force to the relation between Federal courts and Federal administrative tribunals because of the separation of judicial and legislative functions provided for in the Federal Constitution. *Keller v. Potomac Electric Co.*, 261 U. S. 428. The cause in Court and the administrative proceeding before the Secretary were and are thus wholly independent of each other, although it was the Secretary's action in the latter which brought into being a cause of action by reason of whose existence the jurisdiction of the Court was invoked, as may the acts of any other person, public or private, natural or artificial.

Whatever bearing, if any, the attempted analogy to appellate procedure in judicial proceedings may have upon the Government's argument that the District Court had the power to make an order requiring the funds in question to be impounded, not only pending the cause, but also pending subsequent action which the Secretary might or might not take, and the determination of its validity in another or new cause, should it be attacked, it lends no support to the contention that the Court *did* make such an order. It admits of no doubt that when the Court ordered that the monies be impounded "pending final disposition of this

cause"; it used the words in the sense in which they are customarily employed in interlocutory orders, meaning thereby the cause pending in the court in which the order was entered. For the reasons stated above, we think the words "pending final disposition of this cause" are susceptible of no other interpretation. Certain it is that if it was the purpose of the Court, *as it says it was not*, to provide that the monies be impounded to await some further and subsequent determination by both the Secretary and the Court, the words employed were wholly inept for the purpose. There is therefore no warrant for reading into the orders an unexpressed condition, which is neither contained therein, nor within the intent of the Court which entered the orders, as evidenced by the opinion below (R. 248).

Such a conclusion is made inevitable by five separate and distinct considerations. The first is that the only security required by Section 382, of Title 28, U. S. Code, which governs security in connection with the obtaining of injunctions, is security against damages due to the issuance of an improvident injunction. The second is that if the Government's contentions should be accepted, it would, as a practical matter, be impossible to make the requisite showing of irreparable injury required by the Urgent Deficiencies Act.² The third is that the terms of the temporary re-

²This is so because it would be necessary for the petitioner in such a case not only to show that it would be injured by the enforcement of the challenged order if permitted to become effective, *pendente lite*, although invalid, but also to show that, if set aside, the administrative officer or tribunal which entered it could never thereafter, by a new and valid order, re-establish the rates prescribed by the order under attack.

straining orders are in conflict with the Government's contentions. The fourth is that the statutory court has in no uncertain words declared that it was not its intention to do what the Government claims. The fifth is discussed in Point VIII, pp. 116-123 *post*, and is lack of power in the Court to so condition its restraining orders as to itself enter the rate-fixing field.

The order of the Court below should therefore be affirmed, since it is the only order the Court could properly make under the terms and in view of the purpose of the orders by which the funds now in the custody of the Court were impounded. The propriety of the order below is, of course, in no wise affected because in disposing of funds in accordance therewith, the Court may be compelled to determine the rights of various claimants thereto, such as assignees, creditors, etc. These are persons claiming under the market agencies and not against them. Clearly if, by reason of assignments, insolvency, etc., one of the agencies by whom the funds were deposited is no longer their owner, the true owner may make a claim thereto. Exercise by the Court below of jurisdiction to determine questions such as these, however, lends no support to the argument that the Court could now, as it refused to do, retain the funds after the causes have been finally determined, to await some further determination by the Secretary and Court by reason of some proceedings which may be subsequently taken, and which, when taken, may give rise to some further cause in Court.

II

NO CASE OR CONTROVERSY OR JUSTICIABLE ISSUE EXISTED IN THE COURT BELOW. IT THEREFORE WAS NECESSARY FOR IT TO RELEASE THE IMPOUNDED FUNDS AS IT DID.

No "case" or "controversy" involving the reasonableness of appellees' rates, (as distinguished from their confiscatory character) now is or has ever been before the statutory court.⁹ Appellees' suits under the Urgent Deficiencies Act were brought for only one purpose and could have been brought for no other. This was to determine the validity of the Secretary's rate-fixing order and if invalid to have it set aside. They were not brought to determine the reasonableness of appellees' charges as contained in the tariffs filed by them with the Secretary of Agriculture. That could only be done by the Secretary "after full hearing", and is a legislative question. *Louisville & Nashville R. R. Co. v. Garrett*, 231 U. S. 298, 307; and cases cited Point VIII, pp. 116-123, *post*. What appellants now seek to do is to import into this case a non-judicial issue which has never been in it and could not have been litigated in it. The sole function of the statutory court is to pass upon the validity *vel non* of the quasi-legislative order made by the Secretary. As Mr. Justice Holmes in *Bacon v. Rutland R. R. Co.*, 232 U. S. 134, at p. 138, speaking for this Court, said about a State statute authorizing the review of administrative orders, "the remedy in

⁹"The term 'controversies', if distinguishable at all from 'cases', is so in that it is less comprehensive than the latter.
* * * " *Muskat v. U. S.*, 219 U. S. 346, 356.

any event is purely judicial: to exonerate the appellant from an order that exceeds the law".

The only justiciable issue that was ever in this case, to wit, the validity or invalidity of the Secretary's order, has been conclusively determined by this Court. Appellants' idea that some "case" or "controversy" or justiciable issue remains for the decision of the statutory court doubtless arises out of the confusion of this case with cases in which errors of the lower court in granting or refusing relief have given rise to a right to sue for restitution. Such cases are *Atlantic Coast Line v. Florida*, 295 U. S. 301; *Baltimore & Ohio R. R. Co. v. United States*, 279 U. S. 781; *ex parte Lincoln Gas Co.*, 256 U. S. 512; and *Arkadelphia v. St. Louis Southwestern Ry. Co.*, 249 U. S. 134. In our case, however, there never was or could have been any necessity, under any circumstances, for any restitution proceeding ancillary to the main case, because of the fact that the security given in the form of the impounding of funds was given for the express purpose of obviating the necessity of bringing any restitution proceeding in case the temporary restraining order should prove to be improvident and the market agencies should refuse to refund. The statutory requirement for security where a temporary restraining order or other injunction is issued is clearly based upon the doctrine invoked in *Atlantic Coast Line v. Florida*, 295 U. S. 301, in which the court said, at page 309:

"what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error (citing cases). Indeed, the concept of compulsion has been extended

to cases where the error of the decree was one of inaction rather than action, as where the court has failed to set aside the order of a commission or other administrative body, the constraint of the order being imputed in such circumstances to the refusal of the court to supply a corrective remedy."

In our case the issuance of the temporary restraining order which suspended the Secretary's rates would have been improvident if the Secretary's order had been held valid. But that improvidence would have been secured against by the impounding, thus obviating the necessity of a restitution suit ancillary to the main proceeding if the market agencies should refuse to refund. Since the Secretary's order was held invalid, that is the end of the matter and no "case" or "controversy" remains.¹⁰ The right to possession of the impounded funds automatically vests in the market agencies. Not even an order of the court was necessary for the release thereof, much less an ancillary or independent suit against the Secretary or the shippers. The only function of the order actually made to release the impounded funds was to provide the Clerk with formal authority to release them.

It is plain from the above that there is no "case" or "controversy" in the statutory court between appellees and appellants. The most that can be said is that since the Secretary has attempted to reopen the proceedings before him there may some day be a "case" or "controversy" between him and some or all of the market agencies. In Point we have clearly demonstrated that the quasi-legislative proceedings before the Secretary are entirely independent of the judicial proceedings in court and therefore afford no

¹⁰*Cf. B. & O. R. R. v. I. C. C.*, 215 U. S. 216, 223.

foundation for any argument that there is a "case" or "controversy" in court because the administrative proceedings have been reopened. It is elementary law that a court cannot issue a stay or restraining order except in a "case" or "controversy" legally pending before it. There is no such "case" or "controversy" now pending. There may, indeed, never be any such "case" or "controversy" even in the future because in the reopened proceedings the Secretary may, and indeed clearly should, if he really considers the matter, find that the charges of appellees in force when he issued the order of June 14, 1933 were just and reasonable, or that they are too low and that higher maximums should be set. The market agencies would contest neither of these findings. Thus it is only the mere speculative possibility of there being at some time in the future a "case" or "controversy" upon which the appellants' argument rests.

There was, moreover, no justiciable issue before the statutory court for its determination. We have shown that the case before the statutory court never involved any issue of the reasonableness of the rates being charged by the market agencies¹¹ and that no such issue could be imported into it by motion after this Court had decided the controversy. But assuming the contrary, no such issue was ever presented to the statutory court for its determination, for neither the Secretary nor any shipper alleged to that court, prior to the time it released the impounded funds, that the appellees had ever charged any unreasonable rates.

¹¹The market agencies thought at the time that it was open to them to attack the rates in the Secretary's purported order as confiscatory. This Court held to the contrary in *Acker v. U. S.*, 298 U. S. 426.

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In the *Atlantic Coast Line* case, *supra*, the shippers themselves in their petitions to the court for restitution directly alleged that the rates collected by the railroad were unlawful and unreasonable. The carrier answered the petition, objecting to the jurisdiction of the court and asserting that the Cummer Scale was unreasonable and confiscatory and that the rates collected by it were lawful and reasonable. Thus there was presented to the court a justiciable issue raised by proper pleadings.

Here no such issue whatsoever has been raised even by the Secretary, much less by the shippers.

Without attempting to point out what "case" or "controversy" or justiciable issue there was in the statutory court, appellants merely rely, as we have said, upon such cases as *ex parte Lincoln Gas Co.*, 256 U. S. 512; *Arkadelphia v. St. Louis Southwestern Ry. Co.*, 249 U. S. 134; *Baltimore & Ohio R. R. Co. v. United States*, 279 U. S. 781; and *Atlantic Coast Line v. Florida*, 295 U. S. 301. In each of these cases, unlike this case, there was a "case" or "controversy" and a justiciable issue before the lower court, for each of these cases involved a suit for restitution.

In such cases as *ex parte Lincoln Gas Co.*, 256 U. S. 512, and *Arkadelphia v. St. Louis Southwestern Ry. Co.*, 249 U. S. 134, the statutory court granted injunctions against the enforcement of rate orders, conditioned upon the posting of bonds to repay customers. This Court held that the rate orders were valid and hence that restitution proceedings were properly conducted by the statutory court. In *Baltimore & Ohio R. R. Co. v. United States*, 279 U. S. 781, the statutory court had erroneously refused to set aside an order of the I. C. C. requiring the railroads east of the

Mississippi River to absorb transfer charges across the river on westbound traffic. This Court held, after reversing the decree below, that the east side roads were entitled to restitution in the statutory court.

In the *Atlantic Coast Line* case, 295 U. S. 301, excess tonies¹² had been collected by the railroad pursuant to an order of the I. C. C. which the District Court should have set aside because not supported by proper findings. This Court, therefore, held that the District Court had jurisdiction of a suit for restitution, although it further held that no restitution should have been granted. The theory on which such a restitution suit had to be based was improvident action or inaction of the Court.

In our case no ground for any restitution suit exists. There never has been an order, judgment or decree in this case, having any connection with the impounding of the tonies, which was erroneously entered against the rate-payers and of which the appellees were the beneficiaries. The Secretary's order of June 14, 1933, was erroneous and the several decrees of the statutory court refusing appellees relief against that order were each and all erroneous, but in every case the error was in favor of the appellants, not against them. There is thus no possible excuse or occasion for the application of any doctrine of restitution and

¹²In that case the rates collected during the period covered by the injunction, improvidently issued, were in excess of the rates at the time being lawfully prescribed by the Florida Railroad Commission. In our case the charges collected by the appellees from their clients during the duration of a providently made temporary restraining order were duly filed and published charges, less by ten per cent. than the charges entered by the Secretary in a valid order previously entered. (*cf. Arizona Grocery Co. v. A. T. & S. F. R. R. Co.*, 284 U. S. 387.)

there is no restitution proceeding possible for the statutory court to have jurisdiction over. Since no other "case" or "controversy" has been suggested, the monies paid over by the shippers to the appellees, which constitute the impounded fund, represent monies which were lawfully collected, and there is no justification for their being retained by the statutory court as appellants demand.

III

THE SECRETARY IS WITHOUT POWER TO MAKE A NUNC PRO TUNC, PREDATED OR RETROACTIVE ORDER IN THE REOPENED PROCEEDINGS NOW PENDING BEFORE HIM.

In their "motion for order staying distribution of impounded moneys" in the Court below (R. 184-186) the appellants alleged that

"4. On June 1, 1938, the Secretary of Agriculture issued an order reopening the proceeding in which the aforesaid order of June 14, 1933, was entered" (R. 185).

It was further alleged that

"* * * In the proceeding reopened by the said order of June 1, 1938, the Secretary, as provided by the rules of procedure adopted for such cases on September 14, 1936, will accord to petitioners every right to which the Supreme Court of the United States has held that they are entitled. After full hearing the Secretary will determine by an order as of June 14, 1933, what rates may reasonably be charged by petitioners to their clients for the services rendered them. That order will finally determine * * * all the questions decisive of the rights

of the parties herein and of the shippers in the moneys impounded in this Court * * * (R. 185).

Accordingly, appellants prayed that the funds be held

"until such time as the Secretary, proceeding with due expedition, shall have entered a final order in the proceeding reopened by him by order of June 1, 1938, and such order shall have become effective or its merits have been finally adjudicated by a court of competent jurisdiction or until further order of this Court" (R. 186).

The theory upon which the appellants sought a stay and resisted distribution, as evidenced by their motion was thus that the Secretary may now enter a *nunc pro tunc* order as of June 14, 1933, which, when entered, will have the same force and effect as if it had been entered upon that date, and may be attacked only upon the same grounds as if it had been entered then. The appellants' brief in this Court is devoted chiefly to the asserted existence of such power in the Secretary. If such power is non-existent, then further withholding of the impounded funds until the Secretary shall make some further order, which he is without power to make, would be both futile and manifestly unjust to the appellees, even assuming, contrary to the arguments already made, that the appellees are not now entitled as a matter of right to their release.

1. Except in reparation cases, the statute forbids the Secretary to make orders affecting completed transactions. Acting upon his own motion, as he does here, he can make only prospective rates.

The Secretary may, of course, exercise only those powers delegated to him by the Congress, and then only in the

manner prescribed and subject to the limitations, if any imposed by the Act upon the exercise of the powers delegated.

The Act provides that any person who believes himself aggrieved by the exaction of an unreasonable rate filed with the Secretary, may in accordance with the Act (Section 306) file a complaint seeking (1) damages for the exaction of such unreasonable rate, in the past, (2) the naming of a new rate for the future, or (3) for both [Sections 309 (a) and (e) and Section 310]. Upon the filing of such complaint the Secretary, if damages are sought, may "make an order directing the defendant to pay to the complainant the sum to which he is entitled on or before a day named" [Section 309 (e)]. Upon such complaint, if the making of a new rate for the future is sought, the Secretary may also "after full hearing" and if he is

"of the opinion that any rate * * * is or will be unjust, * * * determine and prescribe what will be the just or reasonable rate or charge, or rates or charges, to be *thereafter* observed in such case."

In a proceeding instituted by complaint, the Secretary may therefore, according to the issues raised thereby, determine what "will be the reasonable rate to be thereafter observed" and what was the reasonable rate which should have been charged in the past during the period covered by the complaint.

The Secretary may also

"at any time institute an inquiry on his own motion in any case and as to any matter or thing concerning which a complaint is authorized to be made" [Section 309 (c)]

The proceeding in which the order of June 14, 1933 was entered and which has now been reopened was instituted by the Secretary on his own motion (R. 231). In a proceeding so instituted the powers of the Secretary are both defined and limited as follows:

"The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, *except orders for the payment of money.*" [Section 309 (c)]

The Act thus expressly prohibits the Secretary from making any award of damages in the proceeding now pending before him.¹³ In this type of proceeding he may only

¹³Although it is, of course, sufficient that Congress has so provided, it might not be amiss to take note of the fact that this is an exceedingly sensible arrangement. The concept of reasonable rates, particularly for personal services, is a vague and uncircumscribed one. (*Acker v. U. S.*, 298 U. S. 426; *Morgan v. U. S.*, 304 U. S. 1, 21.) If shippers are willing to let well enough alone, what reason is there for a public official to volunteer on their behalf to make them unsatisfied? In this very case the difference between the Secretary's rates for selling a sixteen-hundred pound steer and appellants' tariff rates is about ten cents a head. This amounts to less than $\frac{1}{100}$ of a cent per pound. The commission men who perform the selling services have absolute discretion in the acceptance of offers. They bargain with the buyers of the packers for the best price they can get. Under the circumstances it is hardly unreasonable to suppose that the owner of cattle may prefer to pay to market agencies what the latter consider just compensation, rather than risk unsatisfactory service at a gain of $\frac{1}{100}$ of a cent

"determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case." [Section 310 (a)]

But whether exercised on complaint or on his own motion, such determination and order may be made only "after full hearing" (Section 310).

2. Unless the order now proposed to be made ought to have been made then, it could not be entered *nunc pro tunc* even in a court proceeding, much less under a statute which expressly prohibits the Secretary from making an order except "after full hearing".

The Congress thus imposed two limitations upon the exercise of the powers delegated by it to the Secretary. First, in a proceeding instituted on his own motion, as this one was, he may not award damages or reparation for the exaction of unreasonable rates in the past. Recognizing

a pound. The cutting down of the owners of these market agencies to an average of forty-eight cents a day for their services and the causing of the two largest concerns at the stockyards, each doing a business of ten million dollars a year, to have deficits, may well make such a result seem sufficiently obvious. (See Point IV, appellants' brief in *Morgan v. U. S.*, No. 581, Oct. Term, 1937 and p. 132 *post*.) The rule of this Court laid down in *Southern Pacific Co. v. Darnell-Taenzler Co.*, 245 U. S. 531, to the effect that reparation must be measured by the difference between reasonable rates and the rates actually charged and that the actual damage need not be proved is all the more reason for permitting shippers to be satisfied with the charges they have paid. By saving ten cents a head on commission charges they may well lose ten dollars a head through incompetent service.

such limitation, the appellants would seek to attain accomplishment of the same result by the entry of a *nunc pro tunc* order fixing rates for the future as of June 14, 1933, but the statute also expressly limits the power of the Secretary to make such an order, except "after full hearing". This Court has held that on June 14, 1933 this requirement of the statute prerequisite to the entry of any order had not been observed. To ask this Court to hold that the Secretary may nevertheless make a *nunc pro tunc* order as of such date is not to invoke the power of this Court to construe and interpret the statute, which alone governs the powers of the Secretary, but to ask it by judicial legislation to confer upon him a power expressly withheld, to wit, the making of an order to speak as of a date prior to the observance of this express statutory requirement. This alone should be sufficient to dispose of the Government's contention that he may enter such an order.

As is well known, courts sometimes make what are known as *nunc pro tunc* orders. An examination of the authorities will show, however, that the circumstances under which these can be made are exceedingly circumscribed. It is only when the order could properly have been made at the time to which it is related back that a court is permitted to enter a *nunc pro tunc* order. *Black on Judgments* (2d ed., 1902), Section 133. The sole legitimate purpose is to correct the record so as to make it speak the truth as to the order which was actually made (*cf. Gagnon v. United States*, 193 U. S. 451). The power is to be exercised to correct clerical, not judicial, errors. *Black, op. cit. supra*, at Section 132.

But even if a court were empowered in judicial proceedings to enter a *nunc pro tunc* order affecting substantive

rights and of the character now sought, the Secretary is without power so to do, because of the statutory requirement that an order fixing or purporting to fix rates for the future may be made only after full hearing.

On June 14, 1933, without according appellees a "full hearing" such as the statute requires, the Secretary issued the order which this Court has held invalid because of a "vital defect", not a mere "irregularity in practice" (304 U. S. 1, at p. 22). No order could have been made, much less ought to have been made, on that date. This Court has held that the order which was attempted to have been made on that date ought not to have been made. Thus, there is absolutely no room for the application of any *nunc pro tunc* doctrine to this situation.

On June 14, 1933, the Secretary was merely in the middle of a hearing.

The absence of a full hearing at the time the order was entered cannot be supplied retroactively by according to the respondents the right to a full hearing now. Only after such a hearing has been had may the Secretary exercise the power conferred upon him to fix rates for the future. Since on June 14, 1933 the respondents had not been accorded a full hearing, the Secretary could not, under the facts of this case, have entered the order now proposed to be made *nunc pro tunc* as of that date. Indeed, if the report and findings and the Secretary's order then entered as a final order had on that date been served upon the respondents, the Secretary could not have entered an order as of that date because the requirements of a full hearing as laid down by this Court in its decision could not have been met until the respondents had been given an opportunity to except thereto and the Secretary had reached an

independent judgment, in a proceeding in which up to that time he had exercised none, by a consideration of the case in the light of the objections taken and the exceptions urged.

As the Court declared in its prior decisions in this case, the order must be supported by findings essential to its validity, which, in turn, must be supported by evidence. The Secretary may not consider those matters which he should not consider, and must consider those matters which he should consider. Moreover, as said by the Court in both of its prior decisions in this case, the findings must be those of the Secretary himself and not those of his subordinates. Such are the duties of the Secretary, and no valid order may be made for the future until they have been exercised. They had not been exercised on June 14, 1933. They have not been exercised now. They cannot be exercised until some time in the future. Until they are exercised, no order may be made; and such order, when made, can speak only as of a date after their exercise and not before.

As the Court points out:

"The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as the beginning and intermediate steps" (304 U. S. at p. 20).

The concluding part of the procedure, namely, the Secretary's consideration of the respondents' exceptions to the findings and order prepared by the Secretary's subordinates and of the record, has not yet taken place and cannot take place until some future date. Without it the hearing required by the statute as written and as interpreted by this

Court has not been completed. No valid order may be made until its completion, and upon its completion such order manifestly may speak only as of the future and not as of a date prior to the completion of the hearing requisite to the validity of any order which the Secretary may make. Appropriate findings sufficient to sustain the order are again essential to its validity. As the Court points out in its opinion on the second appeal and on rehearing, the findings made by the active prosecutors for the Government, and which the Secretary adopted, without notice to the respondents or opportunity to be heard, were "180 in number" and "elaborate". As the Court points out in its opinion on petition for rehearing, these "findings of fact necessary to sustain the order had not been made by him upon his own consideration" but had been prepared "by those who had prosecuted the case for the Government" and "were adopted by the Secretary" (304 U. S. 1 at p. 24). Such action, the Court said, failed "to satisfy the requirement of a full hearing". Unless and until the Secretary, after consideration of the record, and after hearing the respondents upon their exceptions to the findings prepared by such active prosecutors, which have now been served upon the respondents as a tentative report, has himself made such findings as he then thinks it proper to make, there has been no hearing and there can be no order.

Boiled down to its simplest terms, therefore, the contention of the appellees is that the Secretary may not make a *nunc pro tunc* order purporting to speak as of June 14, 1933, which he could not have made at that date. This is so even if, after according to the respondents the full hearing previously denied, he reaches the conclusion that if he had been in the position on June 14, 1933—which the Court

has said he was not—to fix for the future the rates prescribed in the invalid order of that date, he would have done so. To accept any other view of the Secretary's powers would be to deny to the respondents ~~in substance~~ that right to a full, fair and open hearing *preceding* determination by the Secretary, without which, the Court has said, any order entered by him is a nullity.

The vice in the old order was that the findings upon which the order was predicated and which had been prepared by the "active prosecutors for the Government" were accepted by the Secretary without opportunity to the respondents to be heard in respect thereto. It is wholly untenable to suggest that by a re-adoption of these findings after hearing the Secretary may date them back to the date of the old order *before* hearing. We know no theory upon which the right either of a court or of an administrative body to enter a *nunc pro tunc* order can be extended to a case where no order could have been lawfully made as of the date from which it is attempted to be given effect.

3. The appellants' contention that the order will not be retroactive is without merit.

It is the Government's contention that, "In any proper sense the reconsidered order of the Secretary will not be retroactive. The District Court, if it finds that the Secretary has properly entered a valid order in the further proceedings, will direct distribution of the impounded fund on the basis of that order. The retrospective effect of the order in such event will be precisely what it would have been if after five years of litigation the Secretary's order had been sustained and the District Court had distributed

the impounded fund to the farmers. In either case, the effect is to reach back in time to place the parties where they should have been from the beginning" (Brief, pp. 61-62).

Since the order proposed to be made by the Secretary will have no effect upon any transactions except those consummated transactions which resulted in the creation of the impounded fund and he cannot fix any rates for the future, it will be clearly retroactive in its effect and intended to be. Whether or not, however, it is retroactive "in any proper sense", it cannot be made, because the statute expressly forbids the Secretary to make orders for the payment of money upon his own motion and expressly restricts him in such a proceeding to the making of rates "to be thereafter observed" and "after full hearing". Thus, it will not avail the appellants to compare what the Secretary proposes to do with what courts or legislatures may properly do.

If the Secretary's order had been held valid, the District Court would have awarded the impounded funds to the shippers in the event the market agencies had refused to refund. It would in such case have been merely carrying out the terms of its own impounding order. Whether or not such action is retroactive it would be within the power of the Court, which unlike the Secretary in his quasi-legislative capacity is empowered to act with respect to the past. As said by Mr. Justice Holmes in *Prentiss v. Atlantic Coast Line*, 211 U. S. 210 at page 226:

"A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist.

That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind, * * *

If, as is clear, the Secretary in this quasi-legislative proceeding upon his own motion cannot make an order governing consummated transactions, then as we show in Point IX, pages 123-128 *post*, no cooperation on the part of the Court, itself without power in the premises, can be employed to give life to an order made in the absence of power.

Nor is the analogy to legislative acts having some retroactive effect any more compelling. Tax cases such as *Milliken v. U. S.*, 283 U. S. 15 and *U. S. v. Hudson*, 299 U. S. 498, 501, are cited. *Swayne & Hoyt, Ltd. v. U. S.*, 300 U. S. 299, 301-2, and *Graham & Foster v. Goodcell*, 282 U. S. 409, 429-30, are referred to. It is wholly unnecessary, however, in this argument to consider such cases. We are not here dealing with the constitutional power of Congress to enact legislation of limited retroactive effect or to ratify the technical defective acts of the Executive. Congress, of course, as the law-making delegate of the people can enact legislation without reference to any specific type of hearing. The fact that the legislation represents its will is sufficient. *Seuthern Ry. Co. v. Virginia*, 290 U. S. 190 at page 197. But even as to the power of the legislature the appellants have cited the Court to no authority to the effect that either Congress or a State legislature may fix rates to govern consummated transactions. It has been commonly

supposed that such power is limited to the fixing of rates for the future, and it would seem that a legislative act which sought to fix rates to be applicable to past transactions would not only be beyond the scope of the legislative power but would constitute a deprivation of property without due process of law.

However that may be, it is clear that the Secretary who acts as an agent of the Congress, has no general legislative power or authority. He can seek to attain the legislative purpose solely by means of the procedure specifically authorized by Congress as is fully demonstrated in Point V, pages 59-99 *post*. The legislative power delegated to him may be exercised only under the conditions pursuant to which it was delegated. Thus he may act only "after full hearing". No such limitation, of course, is imposed upon Congress itself. Thus, whether or not Congress can pass acts of limited retroactivity to govern particular situations, such limitations have been expressly imposed upon the exercise of the Secretary's powers that when acting upon his own motion in a quasi-legislative proceeding his order may speak only for the future. This distinction between the action of Congress and that of an administrative tribunal is pointed out in *Southern Ry. Co. v. Virginia*, *supra*.

In so far as the Government's argument that the order will not be retroactive is based upon the asserted analogy to judicial proceedings generally or upon the decision of this Court in *Atlantic Coast Line v. Florida*, 295 U. S. 301, it will be dealt with in succeeding sections of this brief.

ANY POWER WHICH THE SECRETARY MAY EVER HAVE HAD TO DETERMINE THE REASONABLENESS OF THE APPELLÉES' CHARGES PUT IN ISSUE BY THE PROCEEDING IN WHICH HIS INVALID ORDER OF JUNE 14, 1933, WAS MADE, IS NOW EXHAUSTED.

As we have pointed out, the Secretary is without power in a proceeding instituted on his own motion to make any award of damages or any order affecting transactions occurring prior to the entry of a valid order. Congress might have provided that in such a proceeding the Secretary might not only establish rates "to be thereafter observed", but award reparation on past transactions occurring either prior to the institution of such proceedings or during their pendency if he found the rates charged were unreasonable for such period or any part thereof. Congress did not choose to confer such power upon the Secretary, but limited his power to the making of rates for the future.

Any proceeding instituted by the Secretary on his own motion, however, necessarily does put in issue the reasonableness of the charges in effect at the time of its institution, but only as applied to the present or future, not as to the past. This is so because he may prescribe a different rate for the future only if he is of opinion "after full hearing" that the existing rate "is or will be unjust, unreasonable or discriminatory" (Section 310). Such a determination is jurisdictional.¹⁴ *I. C. C. v. Louisville & Nashville R. R.*,

¹⁴Thus, contrary to appellants' argument (Brief, p. 37) the Secretary lacked jurisdiction on June 14, 1933 to proceed to the making of a rate for the future, for he had made no legal finding that the existing rates were unreasonable.

227 U. S. 88, 92; *Beaumont, S. L. & W. Ry. v. U. S.*, 282 U. S. 74, 82.

As appears from the Secretary's order now set aside, the proceeding in which it was entered was instituted by an order of inquiry "into the reasonableness and lawfulness of all rates and charges provided in the tariffs of the respondent market agencies at the Kansas City Stockyard". Said order of inquiry and notice alleged:

"that in accordance with the requirements of said Act respondents *had theretofore filed*, published, and put into effect a schedule of rates and charges for their services as market agencies as set forth in their tariffs and supplements thereto; that the interest of shippers, producers of livestock who patronize respondent agencies and the public generally require that inquiry be instituted under Title III of the Act for the purpose of determining the reasonableness and lawfulness of the rates and charges of all respondents named therein *as set forth in their tariffs and supplements thereto*" (R. 21).

The Secretary thus instituted an inquiry into the reasonableness of the charges named in the tariffs then on file and referred to in his order for the purpose only of exercising power conferred to determine what rates should be thereafter observed. On June 14, 1933, the Secretary made the order now set aside. With the entry of this order all issues as to the reasonableness of the previously existing charges to which the inquiry had been directed became moot. Had the Secretary thereafter reopened the proceedings for the purpose of determining whether there should be some modification of such order, the inquiry then would have

related to the reasonableness of the rates prescribed in the order, not to those which had preceded it.

The order of the Secretary, however, was not permitted to become effective and has now been set aside. In the meantime, during the pendency of the litigation the Secretary caused the proceedings to be reopened and entered therein a new and modified order superseding his order of June 14, 1933, and prescribing the rates to be observed on and after November 1, 1937 (R. 191-194). Upon the entry of this order the subject-matter of the inquiry as originally instituted, to wit, the reasonableness of the charges in effect at the time of its institution, came to an end and any issue as to their reasonableness became moot. The rates prescribed in the modified order of October 14, 1937, were therefore the rates in effect at the time the Secretary again reopened the proceedings on June 1, 1938, subsequent to the decision of this Court. The Secretary may, of course, either by the institution of a new inquiry on his own motion, or by a reopening of the proceeding in which both the order of June 14, 1933, and that of October 14, 1937 were entered, enquire into the reasonableness of the rates *now* being charged under the latter order, and after hearing prescribe other and different rates for the future. In such a proceeding, the Secretary would then be required to determine the reasonableness of the rates *now* in effect as a condition precedent to the entry of a new order prescribing other and different rates for the future. The issue presented in such a proceeding would be the reasonableness of those charges, not of those in effect at the time of the original inquiry which has now been superseded by the order of the Secretary now in force. There is, thus, now pending before the Secretary no issue in respect of the reasonableness of the

charges in effect at the time of the original order of inquiry and continued in effect *pendente lite*. That issue has become moot.¹⁵ A determination of their reasonableness would not be material to any inquiry which the Secretary may now make into the rates to be hereafter charged. And since he is expressly forbidden to make any order for the payment of money, the reasonableness of the old charges, no longer in effect, may not be put in issue in that proceeding for the purpose of providing a predicate for such an order.

In the reopened proceedings now pending before the Secretary there is, therefore, now no issue and, under the statute, may be none, concerning the reasonableness of the previously existing charges. While he has undertaken to inquire into the same, such inquiry is without authority of law, even in the exercise of his power to establish rates for the future.

¹⁵If these rates had not been changed so as to terminate the impounding, the only rates which could have been charged after the Secretary's order was invalidated would have been the filed rates. Neither Secretary nor Court could have suspended them pending a new order of the Secretary. This of itself refutes the contention of appellants discussed in Point V, pp. 59-99, *post*, to the effect that procedure must always be subordinated to substance under the Act.

V

THE GOVERNMENT'S CONTENTION THAT THE COURT SHOULD MOLD THE STATUTE TO EFFECTUATE THE SO-CALLED SUBSTANTIVE PROVISIONS OF THE STATUTE BY PERMITTING THE EMPLOYMENT OF AN EXTRAORDINARY REMEDY NOT PROVIDED FOR THEREIN IS WITHOUT SUPPORT IN THE STATUTE ITSELF, CONTRARY TO THE LEGISLATIVE POLICY OF CONGRESS AS EMBODIED IN THE ACT, AND REPUGNANT TO SETTLED PRINCIPLES OF ADMINISTRATIVE AND CONSTITUTIONAL LAW.

The Government points to no provision of the Act empowering the Secretary to proceed in the manner proposed or conferring upon the Court the power to permit the extraordinary remedy suggested to be followed. As we have seen, there is none. The Government in its brief, after referring to the substantive requirements of Section 305, says:

"The Act thus provides merely a general statutory framework and wisely does not attempt to articulate the infinite details of procedure. Doubtless Congress had in mind that this Court has power to mold the statute to effectuate substantive justice. Cf. Landis, *Statutes and Sources of Law* (Harvard Legal Essays, 214). This generality of the enactment makes it all the plainer that these procedural sections of the Act were designed merely to afford a means of attaining the goal which Congress set in Section 305, namely, that 'all rates * * * shall be just, reasonable, and nondiscriminatory' " (p. 20).

Otherwise, it is said, the substantive requirements of the Act become subordinated to its procedural provisions.

This argument overlooks the fact that Congress did clearly and carefully articulate the *fundamental* requirements of procedure, if not its unimportant details. These are that the Secretary may act only *after full hearing*; that he may make rates for the future either upon complaint or upon his own motion, but may determine what were the reasonable rates to have been charged in the past, including the period covered by proceedings pending before him or in court, as well as before, *only* in reparation proceedings brought before him in the manner provided by the statute. The Government does not contend that the procedure which the Secretary is proposing to follow complies with the statutory procedure or is within the powers specifically conferred upon the Secretary. On the contrary, it is asking the Court to give its sanction to the exercise of powers expressly withheld by the statute because those granted are inadequate in its opinion to protect what the Government erroneously conceives to be the substantive rights of the shippers.

To say that the Court may mold the procedure (where the procedure is defined by the statute) to suit the substantive provisions is to say it may legislate and in so doing confer upon the Secretary powers expressly withheld. Neither the Secretary nor any other administrative tribunal has any inherent power. It may exercise only those conferred and in the manner prescribed by the statute for their exercise. The Court has those powers inherent in a court but no power to confer powers upon the Secretary, to free him from those limitations upon the exercise of his powers imposed by the Congress, or to "evolve" remedies in addition to those provided for because the Congress has seen fit to provide remedies which are less complete than the Government thinks they should be. This is not to interpret but to

legislate. Moreover, if there is a gap in the law, it was one which must have been obvious to this Congress since the same gap exists in the Interstate Commerce Act, which has been on the statute books for fifty years.

These considerations alone warrant affirmance of the order below. Moreover, the argument is based upon a complete misconception of the legislative policy of Congress as embodied in the Act, and of the relation between its so-called substantive and procedural provisions as enacted.

1. The prior decisions of this Court in this case constitute a complete answer to the distinction attempted to be made between the effect of substantive and so-called "procedural" errors. Its acceptance would be (1) to disregard the express statutory limitation upon the exercise of the Secretary's power, (2) to deny to appellees substantive rights guaranteed to them by the statute and the Constitution and (3) to violate settled and fundamental principles of administrative law.

The Government throughout its brief treats the defect by reason of which the order was set aside as a mere "procedural" defect or "procedural slip" and, by so doing attempts to draw a distinction between so-called "procedural" errors and the violation of substantive rights. But that which the Government regards as merely "procedural" and formal this Court said constituted a "vital defect" resulting in the denial to the respondents of a substantive right—to wit, the right to a full and fair hearing. To permit the Secretary to cure this "vital defect" by a *nunc pro tunc* order would be not only to override the express statutory limitation upon the exercise of the Secretary's powers but would

be repugnant to fundamental requirements of administrative action which lie at the foundation of administrative law, both substantive and procedural.

This Court in its opinion on the second appeal states that plaintiffs' contention was "that the Secretary's order was made without the hearing required by the statute". This question, the Court says

"goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the legislature" (304 U. S. 1, at p. 14).

A "fair and open hearing" is said to be an inexorable safeguard of the rights of those dealt with by such agencies. Congress, it is said,

"explicitly recognized and emphasized this requirement by making his [the Secretary's] action depend upon a 'full hearing'" (p. 15).

The Court points out that

"Congress, in requiring a 'full hearing', had regard to judicial standards,—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature" (p. 19).

It then points out that in this case the Secretary accepted and made his own the findings which had been prepared

"by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them" (p. 22).

that, the Court said:

"is more than an irregularity in practice; it is a vital defect" (p. 22).

no opportunity, the Court says,

"was afforded to appellants for the examination of the findings thus prepared in the Bureau of Animal Industry until they were served with the order" (p. 17).

In its opinion on petition for rehearing the Court points

"that findings of fact necessary to sustain the order had not been made by him [the Secretary] upon his own consideration of the evidence but as stated below" (p. 24).

these findings, said the Court,

"prepared not by the Secretary but by those who had prosecuted the case for the Government, were adopted by the Secretary with certain rate alterations. No opportunity was afforded to the plaintiffs for the examination of the findings thus prepared until they were served with the Secretary's order and their request for a rehearing was denied" (p. 24).

It was by reason of such conduct upon the part of the Secretary that the Court held that the Secretary had not accorded to the respondents the "rudimentary requirements of a fair play" (p. 15); and because of his failure so to do the order aside.

Failure so to do, as the Court said, constitutes

"more than an irregularity in practice; it is a vital defect" (p. 26).

The error committed by the Secretary was therefore not a mere "procedural" error of a formal character, subject to being corrected by a subsequent order dated back to the date of the first.

In its opinion on the first appeal, this Court said:

"The outstanding allegation, which the District Court struck out, is that the Secretary made the rate order without having heard or read any of the evidence, and without having heard the oral arguments or having read or considered the briefs which the plaintiffs submitted. That the only information which the Secretary had as to the proceeding was what he derived from consultation with employees of the Department" (298 U. S. at p. 478).

* * * * *

"It is no answer [to the contentions of the market agencies] to say that the question for the court is whether the evidence supports the findings and the findings support the order. For the weight ascribed by the law to the findings—their conclusiveness when made within the sphere of the authority conferred—rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. * * * (p. 481)..

"The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the

performance of it in a substantial manner is inseparable from the exercise of the important authority conferred" (pp. 481-2).

The requirement that the administrative officer or tribunal to whom Congress has delegated its legislative authority must himself find the facts lies thus at the foundation of all administrative law, both substantive and procedural. It is upon the assumption that he has done so that his findings are conclusive upon the courts if supported by evidence. As appears from the record made at the second trial and as recited by the Court in its opinion on the second appeal, the Secretary did not observe this fundamental requirement. As the Court said in its second opinion:

"The substance of his action is stated in his answer to the question whether the order represented his independent conclusion, as follows:

" 'My answer to the question would be that that very definitely was my independent conclusion as based on the findings of the men in the Bureau of Animal Industry. I would say, I will try to put it as accurately as possible, that it represented my own independent reactions to the findings of the men in the Bureau of Animal Industry.'

"Save for certain rate alterations, he 'accepted the findings' " (p. 18).

The findings which he accepted were made, as the Court said, by the active prosecutors for the Government.

To permit errors such as these to be corrected by a *quint* *pro tunc* order is to put a premium on snap judgment, upon denial to respondents in proceedings before administrative tribunals of their substantive rights not only to a fair hearing but to fair and impartial determination of the issues of

fact as well as questions of administrative policy by the officer or tribunal to whom Congress has delegated its powers. If the denial of these rights may be corrected by *nunc pro tunc* orders and subsequent but predated determinations, the right of such respondents to their fair and impartial determination by an officer or tribunal approaching them with an open mind is effectively destroyed. It is not in human nature to suppose that such an officer or tribunal, which has already committed itself to findings and orders made in violation of this fundamental requirement of administrative law, will approach a second determination with the same open mind as if that requirement had been met when it should have been met. But in any event, since the statute prevents the Secretary from making an order fixing rates in the future until after full hearing, no determination or order in this proceeding now made but entered *nunc pro tunc* as of a date before there had been such a hearing is permissible under the statute, but would be directly repugnant to its express provisions.

Moreover, if the contentions of the Government are sound, the Secretary may, by a *nunc pro tunc* order or a series of *nunc pro tunc* orders, correct errors successively made until one conforming to both the formal and substantive requirements of the statute has been finally entered. In the judgment of the appellees, the Secretary in the reopened proceedings has already committed serious "procedural" errors which, under the decisions of this Court, would vitiate any order which he now proposes to make. If the contention of the Government is correct, he may thereafter, by another *nunc pro tunc* order, cure these errors. In the meantime, funds impounded as security

against the wrongful issuance of a temporary restraining order—which it now appears was rightfully issued—must be withheld until the Secretary corrects not only the errors by reason of which his first order was set aside, but those upon which his second order may be set aside as well. The acceptance of the Government's contention would thus, in effect, deny to respondents in administrative proceedings the right to contest their validity by permitting the Secretary, by a *nunc pro tunc* order or successive *nunc pro tunc* orders, to make a predated order which, when made, if supported by evidence, will have the same force and effect as if made at the time his invalid order was entered.

Indeed, the Government in its brief states that "a procedure similar to that for which we now contend would be equally applicable to errors of substance, so long as they were of such a character that the order of the Secretary might yet be corrected, such as error in the admission or rejection of evidence" (Brief, p. 71). On the same principle, it would appear that the suggested procedure would be equally applicable if the order were set aside because the findings were unsupported by the evidence if thereafter this defect were cured.

The attempted distinction between procedural and substantive errors is largely a play on words.

The Court is not permitted to pass upon the only substantive question presented in a proceeding before the Secretary or any other administrative tribunal, *i.e.*, the reasonableness of the rates themselves. It may only determine whether he acted in the manner prescribed and within the powers conferred by the statute. In the sense in which the Government uses the word all these questions—the only ones which the Court may decide—are procedural. But

they are also substantive because if the Secretary has not acted in the manner or within the powers prescribed by the statute, those against whom his order is directed have been deprived of their substantive rights. As a consequence, if the order is permitted to stand, they will have been deprived of their property or their liberty of action or both without warrant of law—a denial of the most important substantive right possessed by all free men under a government of laws and not of men. This is so whether the order is void because of the lack of a full hearing, because unsupported by findings, because the findings are unsupported by substantial evidence, or for any other reason." In this case the order was set aside because of the Secretary's disregard of the most fundamental of all substantive rights—that of a full and fair hearing.

2. The Government's contention is based upon a misconception of the legislative policy of Congress as embodied in the Packers and Stock Yards Act and is directly contrary thereto.

According to the Government, the whole legislative policy of the Act is embodied in Section 305. All other provisions are to be disregarded. Although the requirements of this section are not self-executing, and although Congress itself provided the manner in which they are to be effectuated, the mechanism provided by Congress for this purpose is not exclusive. If the statutory mechanism is ineffective to bring all rates at all moments of time into conformity with the substantive requirements of Section 305, the Court may and should evolve additional and substitute procedural mechanisms to implement further the

substantive requirements of the Act. So runs the argument.

This contention is wholly repugnant to the separation of powers as between the legislative, executive and judicial departments of the Government provided for in the Constitution. It is equally repugnant to the policy of Congress as embodied in the Act. The legislative policy of Congress must, of course, be determined from the Act itself and from reading all of its provisions together. So read, it is plain that the legislative purpose was not that attributed to Congress by the Government, and that Congress intended that the substantive requirements of the Act should be effectuated only by the means and with the limitations provided in the statute by Congress. That this is so appears not only from a reading of the Act itself but conclusively appears from a consideration of the legislative history of the Interstate Commerce Act upon which the Packers and Stock Yards Act was not only patterned, but from which its essential provisions were copied almost verbatim (pp. 78-97, *post*).

Without the enactment of the requirements of Section 305 as a standard, the Act would certainly be void as a delegation of legislative power. As in the Interstate Commerce Act, however, this standard or substantive requirement is not self-executing. It may be effectuated only in the manner provided in the sections which follow. These sections, dismissed by the Government as merely procedural, are as much a part of the legislative scheme as is the standard itself. The substantive rights of both the market agencies and the shippers, and the powers of the Secretary, are limited by them and may be exercised and enforced only according to their terms.

All market agencies doing business at a public stock-yards must file their charges with the Secretary (Section 306), which, when filed, become the only lawful charges (Section 306 (f)), whether in fact unreasonably high or unreasonably low, until displaced by other rates voluntarily filed in the manner prescribed by the Act (Section 306(c)) or by a *valid* order of the Secretary prescribing other rates for the future only, and then only after a full hearing. The market agencies are required to collect and the shippers to pay charges so filed under the criminal penalties imposed by the Act. If the charges filed are unreasonably high, the shipper must nevertheless pay them, and the charges which he has paid in the past may be brought into conformity with the substantive requirements of Section 305 only by invoking the reparation provisions of the Act, which may be set in motion only upon his own complaint and within the limitations of time prescribed in the Act. He must also continue to pay such unreasonably high charges for the future until displaced by others made in accordance with its provisions. A continued and continuing application of the standard as applied to all transactions, past, present or future is thus rendered impossible by the terms of the Act itself. Even should the market agency concede the unreasonableness of the charge, it may not charge less for the future until superseded by lower rates or voluntarily pay back to the shipper the difference between a reasonable and unreasonable charge except in response to an award of damages (Section 306).

The requirement that all charges shall be just and reasonable means of necessity just and reasonable to the market agencies as well as just and reasonable to the shippers.

Texas & Pacific Ry. Co. v. I. C. C., 162 U. S. 197, 219; *I. C. C. v. Cincinnati No. & T. P. Ry. Co.*, 167 U. S. 479, 511 and numerous cases decided by the Interstate Commerce Commission cited in Senate Document No. 166, 70th Cong., 1st Sess., *Interstate Commerce Acts Annotated* (1930, U. S. Gov't Printing Office) Vol. I, page 315, annotations to Sec. 1, subd. 5, note 3. If the filed charges are or become unreasonably low, the market agency must still continue to receive them in full satisfaction of its services until displaced by a newer and higher charge to be filed in accordance with the provisions of the Act, although thus deprived of the receipt of a rate conforming to the substantive requirements of Section 305.

Upon the filing of such higher charges having for their purpose the bringing of charges into conformity with the standard of the Act, the Secretary is empowered to suspend such charges for a total period of 60 days pending hearing as to their reasonableness. If at the expiration of such period the Secretary finds the advanced charges to be reasonable, no provision is made for the recovery by the market agencies from the shippers of the difference between the old and the new charges, or for the impounding of funds during suspension, so as to insure to the market agencies the receipt of reasonable rates from and after their attempted inauguration, in order to insure to the market agencies the receipt of rates conforming to the substantive requirements of Section 305. Under the correlative provisions of the Interstate Commerce Act, this suspension power may be exercised for a total period of 150 days (Section 15) without any provision for protecting the carrier by impounding of funds or otherwise in the receipt of a rate conforming to the statutory standard.

It is provided by Section 313 that orders of the Secretary, other than orders for the payment of money, shall continue in force until the further order of the Secretary. Whenever the Secretary, therefore, in a proceeding instituted either upon complaint or on his own motion, validly prescribes rates for the future, those rates and no others must be charged by the market agency until modified or affected by subsequent order. If such rates—reasonable when made by the order of the Secretary—thereafter become unreasonably low, they may not be advanced to a level conforming to the substantive requirement of Section 305 that they shall be just and reasonable both to the market agencies and to the shippers until after, in further proceedings by the Secretary, new and higher rates are prescribed or permitted to be made. If there is controversy as to their reasonableness, this may be done only after further proceedings and hearing, the issues in which will be precisely the same as where proceedings are instituted for the purpose of effectuating a decrease in the charges. In the instant case, protracted hearings were had before the Secretary. The proceeding was pending before him for a period of over 3 years before the order now set aside was entered. The statute makes no provision whereby, if the charges are permitted to be advanced, they may be brought into conformity with the requirements of Section 305 for the period during which the re-opened proceeding was pending or in a suspension case.

If in such a proceeding or in a suspension case the Secretary should deny to the market agencies the right to advance their charges, his order would be subject to review by the institution of suit similar to that in which his order of June

14, 1933 was set aside. If, at the conclusion of such litigation, the court should hold that the Secretary's order denying to the market agencies the right to advance their charges was invalid upon any of the grounds upon which the orders of an administrative tribunal may be attacked, it would be the duty of the court to set the same aside, but the court would be without power in such proceeding to determine what charges the market agencies were entitled to make for the future or should have received in the past. If in a suit brought to test the validity of an order made either in a suspension proceeding or in a proceeding for a modification of a previous order of the Secretary, in order to bring the rates up to the legislative standard, the court should hold that the Secretary exceeded his power in refusing such relief to the market agencies, the statute makes no provision whereby either the court or the Secretary can make the market agencies whole by some sort of proceedings or orders under which the lower rates charged in the interim may be brought into conformity with the legislative standard. Nor could the court in such a case require—as it may where the suit is one to set aside the order of the Secretary reducing rates—that the difference between the lower rates then in effect and the higher rates sought to be imposed by the agencies be impounded to abide the result of the litigation. So to do would be in effect for the court to require the higher rates to become effective during the period of the litigation and thus take unto itself the power to fix temporary rates pending its determination, a power which has not been conferred upon it.

If the court may mold the statute so as to effectuate the substantive requirements of Section 305 by

evolving a "procedural mechanism" not provided for in the Act, where it is claimed that the rates charged during the progress of the proceedings before the Secretary or in court were unreasonably high, it should have the correlative power similarly to mold the statute for the purpose of effectuating the substantive requirements of Section 305, where the contention is that the rates charged during the pendency of administrative or court proceedings are below the legislative standard. Yet if in such a case the market agencies should ask the court to evolve a procedural mechanism for this purpose, the Government and the Secretary would be the first to insist that it was possessed of no such power and rightly so, because Congress, despite the substantive requirements of Section 305, has not itself provided the means—as it might, had it seen fit to do so—whereby rates charged during the pendency of either administrative or judicial proceedings should at their conclusion be brought into harmony with the substantive requirements of the Act, whether out of harmony therewith because too high or too low.

Examination of the Act as a whole, therefore, demonstrates that by the enactment of Section 305 Congress did not intend to confer substantive rights either upon the shippers or upon the market agencies, to be enforced and made effective at every moment of time—whether before or during the pendency of proceedings before the Secretary or in court—but only in the manner and subject to the limitations imposed by the so-called procedural sections of the Act, by which alone the substantive requirements were to be effectuated. Congress clearly contemplated, as it must, that despite the substantive requirements of Section 305 there would be times and occasions of varying periods

of duration within which the rates charged would fail to conform to such substantive requirement because either too high or too low. It made no provision for such contingency. Having made none, the court may make none unless it is going to proceed by judicial legislation to confer powers upon the Secretary or rights upon the farmers or market agencies—as the case may be—not provided for in the statute.

It may be pertinent here to point out what provisions the Act does not contain, but which might have been included therein if Congress had seen fit to adopt a legislative policy in harmony with the contentions of the Government. It might have provided, as do the statutes of many States regulating the rates of public utilities, that within a reasonable time after the enactment of the statute the Secretary should himself establish the reasonable rates to be charged, and that no rate might thereafter be changed without his approval. It might have provided that in proceedings instituted on the Secretary's own motion he should have power to determine not only whether the rate then in effect *"is or will be unreasonable"*, but whether it was also unreasonable for the past, and if so, require the making of reparation for the appropriate period. It might have provided that either in suspension proceedings or in proceedings reopened for the purpose of determining whether rates previously made by the Secretary should be advanced, the difference between the old charge and the proposed new charge should be impounded, the impounded funds to be disposed of in accordance with the determination finally reached by the Secretary,¹⁶ thus insuring conformity to the

¹⁶The Public Service Law of New York (Sec. 113) so provides whenever an advance in the rate is proposed.

requirements of Section 305 during the pendency of the case, whatever its outcome.¹⁷ It might have provided that in a suit brought to set an order of the Secretary aside, the court in addition to being required to find irreparable injury, as required by the Urgent Deficiencies Act, and to take security against the improvident or wrongful issuance of an order restraining the enforcement of the Secretary's order *pendente lite*, such interlocutory order should also be conditioned upon the giving of security, by impounding or otherwise, to conform the charges collected under the protection of such interlocutory order to those which the Secretary might find to have been reasonable during the pendency of the litigation, if his order should be set aside, if the authority so conferred upon him was seasonably exercised.

Each of these provisions, except the first, would be essential to any legislative scheme having for its purpose the continued and continuing effectuation of the requirement that all rates should be just and reasonable both to the market agencies and to the rate-payers. The first, while not essential for this purpose, would require all rates at all times to be those established or approved by the Secretary, although the adoption of this provision without protection to the market agencies if the Secretary suspended or refused to approve reasonable advanced rates, would unless accompanied by the other provisions described, fail to bring about a continued and continuing conformity between the rates collected and the substantive requirements

¹⁷It must be borne in mind that in all such cases the contention of the market agency necessarily must be that the rates then in effect *are* and will be for the future unreasonable.

of Section 1: Congress did not see fit to implement the substantive provisions of the Act by such procedural mechanisms.

The legislative policy of the Act, therefore, was this: That the rates to be charged must be covered by tariffs on file with the Secretary; that these rates when voluntarily filed by the market agencies—as were the rates charged during the pendency of this case—were not only the only legal rates, but presumptively reasonable (*Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 440; *Penna. R. R. Co. v. International Coal Co.*, 230 U. S. 184, 197; *Louisville & Nashville R. R. v. Maxwell*, 237 U. S. 94, 97-98; *Dayton Iron Co. v. Cincinnati Ry.*, 239 U. S. 446, 451); that such rates could be neither raised nor lowered except in conformity with the procedural sections of the Act; that the Secretary could make rates only for the future and then only *after* hearing; and that reparation or award for damages by reason of the exaction of an unreasonable rate could be made only upon a complaint, followed by an award of reparation which, when made, would be *prima facie* evidence only that an unreasonable charge had been exacted. Only by resort to the so-called procedural sections of the Act were the substantive requirements of Section 305 to be effectuated, whether invoked by the shipper on complaint either as to the past or as to the future, by the Secretary in the exercise of his authority to make rates for the future only in proceedings instituted upon his own motion, or by the market agencies for the purpose of having the rates raised to conform to the statutory standard.

The argument that the legislative policy of Congress will be frustrated unless the Court supplements these procedural provisions by the creation of rights and remedies

not provided for, and contrary to those contained in the Act, is thus based upon a complete misconception of the legislative policy of Congress as embodied in the Act and of the essential and intended relationship between the requirements of Section 305 and the so-called procedural provisions by which and only by which charges made either for the past or the future are to be brought into conformity with the requirements of such section.

3. The Government's complete misconception of the legislative policy of Congress and of the relation between the substantive and so-called procedural provisions of the Act is further demonstrated by a consideration of the Interstate Commerce Act and its legislative and judicial history over a period of more than fifty years, upon which Act the Packers and Stock Yards Act was modelled.

The Interstate Commerce Act was passed in 1887. The Packers and Stock Yards Act enacted in 1921 was patterned after it. Indeed, most, if not all of the provisions of the former pertinent to the issues in this case were lifted bodily and verbatim from the Interstate Commerce Act. The Packers and Stock Yards Act was thus modelled upon the Interstate Commerce Act as it existed in 1921. In the thirty-three intervening years the latter had been amended a number of times in important respects. Many of these amendments had to do with substantive rights and duties and correspondingly increased the powers of the Commission. Other equally important amendments had to do with the "procedural mechanism" by which the substantive requirements of the Act in its original form were to be effectuated. The legislative history of these amendments makes it unmistakably plain that in respect of that Act it

was from the beginning the purpose of Congress that its substantive requirements should be effectuated only by the means prescribed and subject to the limitations imposed by its procedural provisions, and in no other manner. The history of these amendments discloses that in adopting them Congress recognized that procedural deficiencies could be cured only by statute, and that where such deficiencies existed, its substantive provisions could be effectuated only by altering the "procedural mechanism" by statutory enactment.

For more than thirty years the Commission was the only Federal administrative agency having to do with the rates of public utilities. Its members were experts, students as well as administrators of administrative law. They were at all times keenly conscious of the substantive requirements of the Act, and equally keen to observe deficiencies in the procedural mechanism by which it was to be effectuated, whenever such appeared. Upon the appearance of such deficiencies they invariably and promptly directed them to the attention of Congress and recommended appropriate legislation. It is not without significance that throughout the fifty years of its existence the Commission has recommended no amendment either in the Act itself or in the statutes governing or limiting the powers of the courts in respect thereto whereby, if an order of the Commission is set aside, either the Commission or the court would be empowered, acting separately or together, to determine what were the reasonable rates which should have been charged during the pendency of such litigation. Yet the situation which now prompts the Government to suggest that the Court should implement the procedural mechanism of the

Act through the provision of additional or substitute remedies is by no means novel. It is a situation which has been present in every case where a rate-making order of the Interstate Commerce Commission has been set aside since the Commission was empowered to fix maximum rates in 1906. Nor has Congress, conscious as it must have been from the beginning that a situation such as is now presented would inevitably arise whenever such an order of the Commission was set aside, and conscious as it must have been that in the flood of litigation which has occurred during the existence of the Act many orders have been set aside, provided by statute the "procedural mechanism" which, in the opinion of the Government in this case, should be provided. Nor, so far as our investigation goes, has any bill looking to the provision of such additional or substitute remedies ever been offered in Congress.

It was from this Act that the Packers and Stock Yards Act was patterned, indeed almost copied. (See Report of the House Committee on Agriculture, 67th Cong., 1st Sess., H. Rep. 77, p. 12.) If in determining the legislative purpose of Congress resort is to be had to extrinsic aid, the legislative history of the Interstate Commerce Act affords the best source from which that legislative purpose may be determined. The legislative history of that Act discloses unmistakably that the scheme of legislation embodied therein was not one by which it was contemplated that the substantive requirements of the Act should be either self-executing or operative at all times and under all circumstances, but that such substantive requirements should be effectuated only through and by means of the procedural mechanism provided for that purpose.

A. FAILURE OF CONGRESS TO ACT FOR TEN YEARS AFTER THIS COURT HAD HELD IN *Interstate Commerce Commission v. Cincinnati, New Orleans and Texas Pacific Railway Co.*, 167 U. S. 479, THAT THE COMMISSION WAS WITHOUT POWER TO BRING RATES FOR THE FUTURE INTO CONFORMITY WITH THE SUBSTANTIVE REQUIREMENTS OF SECTION 1.

The most notable amendment having to do with the manner by which the substantive requirements of the law should be effectuated was the Hepburn Amendment of 1906, conferring upon the Commission the power to fix maximum rates for the future.

The Interstate Commerce Act, as originally enacted and now, like the Packers and Stock Yards Act, contains the substantive requirement that all rates shall be just and reasonable and prohibits and declares unlawful the exaction of an unreasonable rate. (Sec. 1, 24 Stat. 379.) The Act further required the carriers to publish and observe the charges named in schedules to be filed with the Commission (Sec. 6, *Ibid.* 380). It empowered the Commission to award damages for the exaction of an unreasonable rate (Sec. 8, *Ibid.* 382), upon complaint, or in an inquiry instituted on its own motion (Sec. 9, *Ibid.* 382, Sec. 13, *Ibid.* 383-384). It further authorized the Commission if, upon investigation, it found that a carrier had been guilty of a violation of the Act, to order it to cease and desist therefrom (Sec. 15, *Ibid.* 384). By amendment to Sec. 12 enacted in 1889, the Commission was "authorized and required to execute and enforce the provisions of this act" (25 Stat. 858, Sec. 3). By Sec. 16 of the original Act (24 Stat. 384-385) orders of the Commission were enforceable by mandamus. No power to establish reasonable rates for the future was expressly delegated.

In *Interstate Commerce Commission v. Cincinnati, New Orleans and Texas Pacific Railway Co.*, 167 U. S. 479, the Commission upon complaint had found the carrier's rates unreasonably high and had ordered it to cease and desist from charging for the future rates higher than those found by the Commission to be reasonable. The Commission thus sought by indirection to prescribe rates for the future. It brought an action to enforce its order. The court below dismissed the bill and this Court in answer to a certified question held that the order was beyond the power of the Commission.

The argument advanced was substantially that now made, viz., that the substantive requirements of the Act would be frustrated unless the Act should be so construed as to authorize the Commission to enter and enforce the challenged order. Emphasis was placed both upon the power conferred to enter a cease and desist order and upon the affirmative duty to "execute and enforce the provisions" of the Act, a provision wholly lacking in the Packers and Stock Yards Act, by which the Secretary's powers and duties are carefully defined and limited. The Court declined to interpret an Act expressly directing the Commission to execute and enforce its provisions, as conferring upon the Commission any power to "evolve" procedural mechanism in furtherance of its cardinal requirement that "all rates shall be just and reasonable" (Govt. Brief, p. 23) and thus by judicial interpretation to "mold the statute to effectuate substantive justice" (Govt. Brief, p. 20). No suggestion was made in that case that the court itself was possessed of authority to do either of these things.

Had the decision been the other way, it would not be of assistance to the contention the Government now makes.

In that case the power to determine what would be a reasonable rate for the future was neither expressly granted nor expressly withheld. The Court held that not having been expressly granted it was not to be implied, despite the broad powers conferred upon the Commission and the effect of its denial upon the policy declared in Section 1. In this case power to determine a reasonable rate for the past in proceedings instituted by the Secretary on his own motion has been expressly withheld.

But as bearing upon the question now presented—*i.e.*, what is and has been the legislative policy of Congress—the case is significant chiefly not by reason of the decision rendered but on account of what followed.

The decision was rendered on May 24, 1897. In its annual report to Congress of December 6 of that year, the Commission, commenting upon this decision, recommended that the Commission be empowered to establish maximum rates for the future, pointing out that without such power the substantive requirements of Sec. 1 could not be effectuated (Eleventh Annual Report of the Interstate Commerce Commission, 1897, pp. 15-22).

These recommendations were renewed from year to year (Annual Reports of the Interstate Commerce Commission for the years 1898-1905).¹⁸

In its Sixteenth Annual Report (1902), the Commission, commenting upon the fact that the Act had then been in effect for nearly 16 years, again pointed out that the sub-

¹⁸Twelfth Annual Report (1898), p. 27; Thirteenth Annual Report (1899), pp. 5-8; Fourteenth Annual Report (1900), p. 5; Fifteenth Annual Report (1901), pp. 5-6; Sixteenth Annual Report (1902), pp. 6-7; Seventeenth Annual Report (1903), pp. 11-13; Eighteenth Annual Report (1904), pp. 5-10; Nineteenth Annual Report (1905), p. 5.

stantive requirements of Sec. 1 could not be effectuated unless the Commission were empowered to make rates for the future (pp. 6-7).

It was not until nearly ten years after the decision in *Interstate Commerce Commission v. Cincinnati, New Orleans and Texas Pacific Railway Co.*, *supra*, that Congress, through the passage of the Hepburn Amendments in 1906, conferred this power upon the Commission. Whether it is now believed that *Interstate Commerce Commission v. Cincinnati, New Orleans and Texas Pacific Railway Co.* was rightly or wrongly decided, the inaction of Congress for a period of ten years thereafter would seem to be a complete answer to the contention that the substantive requirement that all rates should be just and reasonable was intended by Congress to be effectuated in any manner except that specifically prescribed and subject to the limitations imposed by Congress upon the exercise of the Commission's powers as contained in the Act itself.

The argument that Congress intended to effectuate the substantive requirements of Section 1 by resort to the power of the Commission to "execute and enforce" the provisions of the Act by the entry of cease and desist orders enforceable in mandamus proceedings was not wholly without substance. Had the Congress been of the opinion that such was its intent, it would without doubt have promptly amended the Act so as to provide the necessary procedural mechanism for the accomplishment of its purpose. Instead it did nothing for ten years, although repeatedly warned by the Commission that by reason of its inaction the Commission was unable to effectuate the substantive requirements of that section. As said by the Commission in its Twelfth Annual Report (1898), page 27:

"Without authority to determine and order a maximum rate after due hearing and investigation, the Commission cannot execute the provision in the first section of the law requiring reasonable rates."

To similar effect is the language of the Commission in each of its Reports between the date of the decision and the Hepburn Amendments.

In *Arizona Grocery Company v. Atchison Ry. Co.*, 284 U. S. 370, the Court held that under the Interstate Commerce Act, as it now stands, a shipper was not entitled to reparation if the carrier's rate was as low or lower than one previously prescribed by the Commission as reasonable, even though such rate might in the meantime have become unreasonably high. The argument of the Grocery Company in that case is thus summarized in the opinion of the Court (pp. 389-390):

"The argument is pressed that this conclusion will work serious inconvenience in the administration of the Act; will require the Commission constantly to reexamine the fairness of rates prescribed, and will put an unbearable burden upon that body."

Counsel for the Grocery Company might have added, in the language of the Government in this case, that if the arguments of the Railway Company prevailed, as they did, the substantive requirements of Section 1 could not be effectuated by reason of the absence of appropriate "procedural mechanism" whereby reparation should be awarded for the exaction of an unreasonable rate, the Commission having found that the rate established originally by it had become unreasonably high. The Court answering the argument of the Grocery Company said:

"If this is so, it results from the new policy declared by the Congress, which, in effect, vests in the Commission the power to legislate in specific cases as to the future conduct of the carrier. But it is also to be observed that so long as the Act continues in its present form, the great mass of rates will be carrier-made rates, as to which the Commission need take no action except of its own volition or upon complaint, and may in such case award reparation by reason of the charges made to shippers under the theretofore existing rate" (p. 390).

It thus appears that even under the present law rates in effect at a given time are largely carrier-made rates, which may or may not conform to the requirements of Section 1, but which may be brought into harmony therewith as to the future only through the establishment by the Commission of a rate to be "thereafter observed", and for the past in reparation proceedings brought in behalf of that limited number of shippers who choose to institute them. This was all the more true under the statute as originally enacted, and particularly during the period intervening between the decision in *Interstate Commerce Commission v. Cincinnati, New Orleans and Texas Pacific Railway Co.*, *supra*, and the Hepburn Amendments.

This Court having held that the original Act did not confer upon the Commission any rate-making power, the principal "procedural mechanism" remaining in the original Act was that requiring the carrier to file and observe its rates, leaving it to the judgment of the carrier to determine whether they conformed to the requirements of the section, subject only to the complaint of those shippers (relatively few in number as the Annual Reports of the Com-

mission during that period show) who might invoke the reparation provision of the Act. This must have been obvious to Congress. If not, it was repeatedly pointed out to it by the Reports of the Commission, yet Congress chose for ten years to "subordinate" the substantive requirements of Section 1 to the procedural mechanism of the Act, and by so doing to rely largely, although not entirely, upon the carriers to bring their rates into conformity with the requirements of Section 1, without adequate remedy either through action by the Commission or, in large measure, by shippers.

B. FAILURE TO CONFER UPON THE COMMISSION POWER TO SUSPEND ADVANCES IN RATES UNTIL 1910.

The Act, originally and even as amended in 1906, left the carrier free to advance rates at will so long as the advance was published and filed. By the exercise of this power rates might be thrown out of harmony with the substantive requirements of Section 1 and remain so until brought into harmony therewith by subsequent action of the Commission after the delay incident to hearing and possibly to ensuing litigation. In its Twenty-first Annual Report (1907), following almost immediately after the amendments of 1906, the Commission said (p. 6):

"The main purpose of that legislation (the amendments of 1906) was to provide more adequate means for the enforcement of rights and duties already declared to exist. The vital principle of a right is found in the obligation to respect it. Without remedial procedure the declaratory portion of any law is little more than the statutory expression of a sentiment, but when efficient machinery for securing ob-

servance is provided the performance of definite duties and the recognition of definite rights may be expected to follow in ordinary conduct without resort to litigation. That this is true in regard to the amended act, and to an extent not generally appreciated, is confidently asserted."

Accordingly, it recommended that it be empowered to suspend advances in rates pending determination of their reasonableness after hearing (p. 8, pp. 9-10).

The Commission thus recognized, as had Congress by its inaction for a period of ten years following the decision in the case of *Interstate Commerce Commission v. Cincinnati, New Orleans and Texas Pacific Railway Co.*, *supra*, that the substantive requirements of the Act could be effectuated only through resort to the procedural provisions, which could be supplied only by Congress.

The Commission renewed its recommendation in its Annual Reports for the years 1908 (pp. 10-11) and 1909 (pp. 6-7). Congress did not act upon these recommendations until 1910, when by the Mann-Elkins Act the Commission was empowered to suspend advances in rates for an initial period of 120 days and a subsequent period of six months further (36 Stat. 552, Sec. 12). Only by an amendment of the so-called procedural sections of the Act was the statute thus brought more nearly into conformity with the purposes and requirements of Section 1 and then not until three years after the deficiency in the mechanism provided to implement the requirements had been brought to the attention of the Congress.

While adoption of the proposed amendment was thus designed to bring the carrier's charges into conformity with the requirements of Section 1 where it was charged that the

advanced rate would be unreasonably high, Congress did not see fit to insure their conformity to its requirements if the existing rate was unreasonably low and the proposed advance just and reasonable, by providing any means by which the carrier would be protected during the period of suspension in the receipt of a rate just and reasonable to it—and thus conforming to the requirements of Section 1—if at the conclusion of the suspension period the advanced rate should be sustained as reasonable, either through impounding the difference during suspension or through providing any remedy to the carrier at the termination of the suspension period as provided for in the New York Public Service Law. Yet if the legislative policy of Congress were—as the Government insists it is under the Packers and Stock Yards Act—to provide for a scheme of regulation under which all rates at all times should conform to the requirements of Section 1, some such provision was obviously necessary. The carrier, however, was thus left remediless in the event the advanced rate turned out to be reasonable, solely by failure of Congress to enact suitable procedural provisions to insure to the carrier, during the suspension period, the receipt of a rate conforming to the substantive requirements of Section 1, just as by having previously failed to confer upon the Commission the power to suspend rates it had left shippers remediless (except through resort to reparation proceedings by those who chose to resort thereto) whenever the carrier exercised its previous right without restraint to advance its rates to such figure as it saw fit.¹⁹

¹⁹By the Transportation Act (41 Stat. 456) the Commission's power to suspend advances in rates was cut down from a total suspension period of ten months to a total suspension

C. CORRECTION OF THE PROCEDURAL PROVISIONS BY MAKING IT CLEAR THAT THE COMMISSION HAD POWER TO MAKE RATES FOR THE FUTURE IN PROCEEDINGS INSTITUTED ON ITS OWN MOTION AS WELL AS BY COMPLAINT.

Section 13 of the original Act provided that the Commission itself might "institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made" (24 Stat. 384). Section 15 provided that "in any case in which an investigation shall

period of five months, by reducing the period of the second suspension which might be ordered from six months to 30 days. At the same time, the statute required that if the suspension proceeding had not been concluded at the expiration of the first period of 120 days or of the second period of 30 days, the Commission by order might "require the interested carrier or carriers to keep account in detail of all amounts paid by reason of such increase, specifying by whom and in whose behalf such amounts are paid and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund with interest to the persons in whose behalf such amounts were paid such portion of such increased rates or charges as by its decision shall be found not justified." Congress thus in part recognized the injustice of requiring carriers to maintain old and lower rates in effect pending the determination of the suspension proceeding, by cutting the total period thereof down, but provided no means by which the carrier could be protected against the receipt of unreasonably low charges for the five months during which the rates could be suspended. It did, however, confer upon the Commission power to protect the shipper against the exaction of an unreasonable rate for a longer period by the provisions quoted above. Here again Congress, in the exercise of its legislative power and by the procedural provisions adopted, made it again evident that the substantive requirements of Section 1 were to be effectuated only to the extent provided for in the so-called procedural provisions of the Act.

be made by said Commission" it might enter an appropriate order (24 Stat. 384).

The power to establish the maximum rate or rates "to be thereafter observed" was conferred, as previously stated, by the Hepburn Amendments of 1906. Those amendments made no change in Section 13. Section 15 was amended, however, so as to read (34 Stat. 589):

"That the Commission is authorized and empowered * * * whenever, after full hearing *upon a complaint* made as provided in section 13 of this act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates or charges whatsoever demanded, charged or collected by any common carrier * * * are unjust or unreasonable * * * to determine and prescribe what will be the just and reasonable rate or rates, charge or charges to be thereafter observed in such case as the maximum to be charged."

The Hepburn Amendments of 1906, literally construed, would have confined the exercise of the Commission's rate-making power to cases instituted by complaint. Accordingly in its Twenty-third Annual Report to Congress (1909) the Commission recommended that Section 15 be amended so as to confer upon the Commission unmistakable authority to exercise its rate-making power in proceedings instituted upon its own motion as well as upon complaint (p. 8).

This recommendation was effectuated by an appropriate amendment of Section 15 in the following year, 1910 (36 Stat. 551, Sec. 12). In this case the Congress acted promptly, doubtless because the omission in Section 15, as amended in 1906, was an oversight. The important thing is

that Congress, like the Commission, recognized that, under the whole scheme of the Act, its substantive requirements could be effectuated only through its procedural provisions, which were consequently required to be clearly expressed.

D. FAILURE TO REMOVE THE TWO-YEAR LIMITATION ON THE COMMISSION'S RATE-MAKING ORDERS (IMPOSED IN 1906) UNTIL 1920.

Section 15 of the Act as amended in 1906, at which time the Commission was first empowered to make rates for the future, provided:

"All orders of the Commission, except orders for the payment of money, * * * shall continue in force for such period of time not exceeding two years as shall be prescribed in the order of the Commission" (34 Stat. 589).

At the expiration of two years the carrier was thus free to advance the rate prescribed by the Commission's order to any figure it saw fit. The carrier was thus empowered to establish a rate higher than that conforming to the requirements of Section 1 and to exact the same until displaced by a subsequent order of the Commission. This deficiency in the "procedural mechanism" was not cured for fourteen years or until 1920 although it had been called to the attention of Congress four years earlier in the Commission's Thirteenth Annual Report (1916), page 77:

"The orders of the Commission are binding for a maximum period of two years. It frequently results that discriminatory or unreasonable rate situations considered in an investigation extending over a substantial period of time and involving a large

amount of work and expense, and which are corrected for a period of two years by an order, are reestablished immediately upon the expiration of the two years, thus necessitating another equally or more exhaustive investigation."

* * * * *

"These and other contributing causes lead to the result that in this respect and to this extent the present system or plan of regulation resolves itself largely into a sort of continuous moving around in a circle. * * *"

By the Transportation Act, 1920 (Sec. 418, 41 Stat. 485, amending Section 15 of the Interstate Commerce Act) Congress removed this limitation by providing that:

"all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction."

Until the so-called procedural provisions of the Act were thus amended the substantive requirements of Section 1 might be frustrated by an advance in the rate after the expiration of the Commission's order.

In curing this procedural defect, however, the Congress created another not yet cured. As a result of the amendment the carrier was required to go on charging the Commission-made rate—although in the meantime it may have become unreasonable—until modified by a

subsequent order of the Commission, which in the normal course of things could only be had after conduct of further proceedings by the Commission, the duration of which would depend upon the nature and scope of the rates thus again brought before it for review. In any general rate case or one of wide scope, these were certain to be protracted. Yet Congress made no provision by which the carrier would be protected in its right to a reasonable charge during the pendency of such proceedings, or of any subsequent proceedings in court, by the impounding of the difference between the Commission-made rate and the proposed advance, if it should turn out that the rate previously established by the Commission had become unreasonably low and hence failed to conform to the substantive requirements of Section 1.

E. FAILURE TO CONFER UPON THE COMMISSION POWER TO MAKE MINIMUM RATES UNTIL 1920.

Section 3 of the original Act provided as follows:

"SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Enforcement of the substantive requirements of this provision are as essential to the effectuation of the policies

of the Act as enforcement of the substantive requirements of Section 1. Indeed, according to many students of the transportation problem, the relation of rates between competitors or competing sources of supply is as important, if not more so, to shippers as the measure of the rate charged.

As early as 1898 the Commission recommended that it be empowered to fix minimum rates, saying in its Twelfth Annual Report (1898):

"the power to prescribe a *minimum* as well as a maximum rate is necessary to enforce the prohibition against undue preferences as between localities in cases where the places involved are not served by the same line" (p. 27).

The Congress failed to act upon it until 1920, when by the Transportation Act of that year (41 Stat. 485) it conferred upon the Commission power to establish minimum as well as maximum rates by appropriate amendment of Section 15.

F. REDUCTION OF TIME WITHIN WHICH REPARATION CLAIMS MIGHT BE FILED.

Prior to the Hepburn Amendments of 1906, no period of limitations for the filing of complaints by individual shippers for an award of damages for the exaction of an unreasonable rate was provided for in the Act. Since that time, all such complaints are required to be filed "within two years from the time the cause of action accrues" (Section 16 (2), Interstate Commerce Act, as amended by Section 5 of Hepburn Act, 34 Stat. 590). By thus amending the "procedural mechanism" the Congress reduced the period

within which rates which failed to conform to the requirement of Section 1 could be brought into harmony therewith as to past transactions through reparation proceedings.

It is not without interest that in its Forty-fourth Annual Report (1930) the Commission recommended that the period within which complaints seeking reparation might be filed with the Commission should be further reduced to ninety days, the period provided in the Packers and Stock Yards Act. It renewed this recommendation in its Forty-fifth (1931) and Forty-sixth (1932) Annual Reports. Congress has taken no action to carry these recommendations into effect.

G. WITHDRAWAL FROM THE COMMISSION OF THE POWER TO AWARD REPARATION IN PROCEEDINGS INSTITUTED BY IT ON ITS OWN MOTION.

The original Act made no distinction between orders which might be issued by the Commission in proceedings instituted under Section 13 by complaint or on the Commission's own motion. By the Mann-Elkins Act (Sec. 11, 36 Stat. 551) Section 13 was amended so as to provide that in proceedings instituted on the Commission's own motion it should be empowered

"to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this act, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, *excepting orders for the payment of money.*"

Congress by a contraction of the "procedural mechanism" made it more difficult to bring rates on past transactions into conformity with the requirements of Section 1.

H. CONCLUSION.

The legislative history of the Interstate Commerce Act, like the provisions of the Packers and Stock Yards Act hereinafore reviewed, thus lends no support to the Government's major premise, namely, that the Congress contemplated that this Court should have the power "to mold the statute" so as to effectuate the substantive requirements of the Act or to "evolve procedural mechanism" for that purpose by the establishment of rights and the provision of extraordinary remedies to that end. On the contrary, the legislative history of the Act, the recommendations of the Commission made from time to time in respect thereto, and the action or inaction of Congress in respect thereof make it plain that the Congress, as appears upon the face both of the Interstate Commerce Act and of the Packers and Stock Yards Act, intended that its so-called substantive requirements should be effectuated only in the manner prescribed and within the limitations imposed by its procedural provisions.

4. The failure of the Commission to recommend or of the Congress to provide for any such supplementary remedy as now proposed during the fifty years of experience with the Interstate Commerce Act from which the Packers and Stock Yards Act was copied, is persuasive, if not conclusive, that none such was intended.

The Interstate Commerce Act has been in operation for more than fifty years. The Commission has been empow-

ered to establish rates for the future for more than three years. Throughout this period it has been the specific duty of the Commission to make to Congress annually "such recommendations as to additional legislation as the Commission may deem necessary" (Section 21).

During this period innumerable suits have been brought to set aside the Commission's orders. In some cases its orders have been sustained and in others set aside. In some cases its orders have been set aside by the District Courts but sustained by this Court on appeal. In some cases its orders have been sustained by the District Courts but set aside on appeal. In some cases injunctions *pendente lite* have been issued, in others not. A review of the reports of the Interstate Commerce Commission will disclose that in proceedings involving a whole scheme of rates as in this proceeding, there is a substantial lapse of time between the institution of a proceeding brought for that purpose and its final determination by the Commission. It is perfectly obvious that in such proceedings before the Commission, if the rates be reduced at the end of it, the rates charged during its pendency, and perhaps prior thereto, will have been unreasonably high for substantial periods of time. It is equally obvious that if such proceedings, whether arising under the exercise of the Commission's suspension power or otherwise, result in an advance of rates, the rates charged during its pendency, and perhaps prior thereto, have in all probability been unreasonably low and have hence lacked conformity with the substantive requirements of Section 1. It is equally obvious that if a Commission order reducing rates has been suspended *pendente lite*, either by the court or by voluntary action of the Commission, as frequently has

pens, and such order is ultimately sustained, unreasonable rates will have been exacted from the shippers in the interim. It is equally obvious that if the order of the Commission shall be set aside, but not suspended *pendente lite* either by temporary injunction or voluntary action upon the part of the Commission, the carrier will have been denied the right to the receipt of a reasonable charge in the interim. It is equally obvious that under the suspension and other provisions of the Act, if the carrier is required to resort to the courts in order to set aside an order of the Commission forbidding an advance, and prevails in such suit, it will have been required, under compulsion of law, to forego its right to the exaction of a reasonable rate during the pendency of the proceedings both before the Commission and in court.

Yet in all this period the Commission has made no recommendation to Congress that the law be amended so as to bring the rates charged, either during the pendency of proceedings before the Commission or of suits in court to review its orders, into conformity with the substantive requirements of Section 1, by conferring additional power either upon the Commission or upon the courts, or by impounding funds to be held pending the determination either of the proceeding before the Commission or of suits brought in court to test the validity of the Commission's orders. Nor so far as we are aware has any such proposal been made by any one else, either in or out of Congress. Yet the situation presented in this case has arisen with recurring frequency.

VI

THE ANALOGY TO COURT PROCEEDINGS, FAR FROM SUPPORTING THE GOVERNMENT'S CONTENTIONS, SUPPORTS THOSE OF THE APPELLEES.

Whenever a court finds that an order of the Secretary or of any administrative tribunal is void, its function is at an end. It may not in any way control the further action of the Secretary. What he may do or not do thereafter depends, first, upon the statute, and second, upon his own volition. The analogy to a new trial in judicial proceedings breaks down at every point.

Moreover, on a new trial a court may not render any judgment or enter any order which goes beyond the issues in the case in which such new trial is granted or which is beyond its jurisdiction. If the pleadings remain the same and the proof the same, it may enter the same judgment over again, but not, as here sought, *nunc pro tunc*. And certainly it may not determine questions not at issue and which, under the statutory limitation placed upon its jurisdiction, it has no power to determine. Under the Packers and Stock Yards Act the Secretary may make an order fixing rates for the future only. In a proceeding instituted on his own motion he may not enter an award of reparation or make any determination of the reasonableness of charges collected while the case was pending before him. Under the new trial analogy carried to the extreme the Secretary may enter the same kind of an order and make the same kind of determination that he could have entered had he proceeded properly in the first place and no other. That is the most a court could do on a new trial. But he could not then or now

award reparation or determine the reasonableness of the charges collected during the pendency of the proceedings, or enter a *nunc pro tunc* order fixing rates for the future. The statute expressly forbids both: the first, because he may not make an order for the payment of money, the second, because an order fixing rates for the future may be made only after full hearing, and on June 14, 1933 there had been none.

When a new trial is ordered in court the judgment is entered as of the date of its rendition—not as of the date of the judgment previously set aside. But this kind of a judgment or order—the only kind a court may enter—advances the Government nowhere.²⁰

In an action at law the judgment, whenever entered, customarily operates wholly on past transactions, although operative as a judgment only after entry. This is because it is based upon a cause of action growing out of such transactions and antedating the complaint. If the cause of action

²⁰When a plaintiff in an ordinary lawsuit loses the benefit of a judgment by the procedural errors of the trial court, which frequently he is unable to prevent, it would hardly occur to him to insist, despite the lack of fault on his part, that a judgment granted to him after a new trial might be similar to the reversed judgment and therefore ought to be dated back to the time when the latter was entered. It would not, we submit, occur to the Secretary in this case to make such a proposal if it were not for the fact that he is both prosecutor and judge and in the latter capacity realizes that he possesses the power to make his subsequent order identical with his order of June 14, 1933, invalidated by this Court. This is particularly true in view of the fact that no rule of law appears to exist to govern his action in fixing rates for personal services. He has in fact already publicly announced (prior to any reconsideration of the case) that he intends to do so, having said that the impounded funds "rightly belonged to the farmer" (Govt. Brief, p. 96).

is a continuing one, damages may sometimes be awarded up to the time of judgment, but usually there is no such question. Similarly, in a reparation proceeding before the Secretary the order entered relates to past transactions occurring prior to the filing of the complaint. The rates charged to have been unreasonable for the past may continue to be unreasonable during the pendency of the proceeding. No reparation for such period may be recovered, however, except upon the filing of new or supplemental complaints.²¹ This because the statute so requires. Here is another case where the procedural provisions fail to give continuing effect to the hortatory requirements of Section 305. Yet it will scarcely be contended that this Court should implement the statute further for this purpose by "evolving" the necessary "procedural mechanism" which Congress has failed to provide. Nor in a new trial in an action at law could the plaintiff recover on new causes of action, which had arisen during the appeal, although of the same character and de-

²¹The statement is made and constantly reiterated by appellants that decision against them will result in imposing as a penalty for a procedural error an "irretrievable reversal on the merits"; or as otherwise stated, it cannot be argued "that because procedural rights had been denied therefore substantive rights were determined". Only by confusing a proceeding leading to a quasi-legislative rate-fixing order with a judicial proceeding for the determination of the legal effect of operative events in the past can such a specious argument be made in this case. Until a quasi-legislative rate-fixing order is validly made "after full hearing" no event legally operative to disturb the *status quo*, that is, the right of appellees to charge their legally filed tariff rates, has taken place. The proceeding does not concern itself with any cause of action. The act is legislative, not judicial. *Louisville and Nashville R. R. Co. v. Garrett*, 231 U. S. 298, 307; *State Commission v. Wichita Gas Co.*, 290 U. S. 561, 569; *The Chicago Junction Case*, 264 U. S. 258, 265.

pendent upon the same questions of law, except by amendment, and then only if not barred in the interim.

And so the analogy of new trials in actions at law gets the Government nowhere because the proceeding before the Secretary has none of the incidents of an action at law, since in such a proceeding he may act only upon the rates to be thereafter charged, not from the date when the proceeding was instituted, but from and after the date of the order and then only after full hearing.

In a new trial in an injunction case, the injunctive relief, of course, operates on the future conduct of the parties only. No one ever heard of a *nunc pro tunc* injunction. Where pleadings and proof warrant, damages for the past may be assessed in an injunction suit, because it is within the judicial power to give complete relief in one proceeding. The exercise of this power does not depend upon whether there has been a previous decree, reversed on appeal and subsequently reentered at the end of a new trial. Equity's jurisdiction to assess damages attached when the suit was first filed and may run back to such period in the past as the facts justify. But the Secretary, in a proceeding instituted on his own motion, may not award damages for any period. Congress not only failed to confer any such authority upon him, but expressly withheld it from him.

And so if we follow the analogy to the end, it turns against the Government. On a new trial a court may enter only such judgment as it could have entered in the first place on the issues submitted by the pleadings and subject to such jurisdictional limitation, if any, as may have been imposed upon it by statute. So with the Secretary, when an order of his has been set aside, he may reopen the proceeding in which made but may enter only such order as

is permissible under the issues presented in that proceeding and subject to its jurisdictional limitation. These he may not disregard because litigation has intervened, any more than a court may disregard similar limitations because a new trial has been ordered because of its previous error, procedural or otherwise. In other words, the jurisdiction of neither may be enlarged because of its own previous error.

Nor could an appellate court, having set aside an erroneous judgment or decree and sent the case back for a new trial, direct the trial court to exercise on the new trial a jurisdiction expressly withheld from it by statute. But that is precisely what the Government is urging may be done in this case.

VII

THE AUTHORITIES CITED BY APPELLANTS DO NOT SUPPORT THEIR POSITION.

The authority most strongly relied on by appellants is *Atlantic Coast Line v. Florida*, 295 U. S. 301. The discussion of this case is followed with a discussion of two New York intermediate court cases, *New York Edison Co. v. Maltbie*, 244 App. Div. 436 (3rd Dept.); *Brooklyn Union Gas Co. v. Maltbie*, 245 App. Div. 74 (3rd Dept.). The argument concludes with a discussion of *habeas corpus* cases in immigration proceedings. *Mahler v. Eby*, 264 U. S. 32; and *Tod v. Waldman*, 266 U. S. 113.

(a) The New York Intermediate Court Cases.

Of these five cases the only ones at all analogous to our situation are the two New York cases decided in one of the

several departments of the intermediate court in New York. The orders in these cases with relation to the impounded funds were made, as is expressly noted by the court, in the exercise of its discretion. There is little or no reasoning in the opinions which is of any value to this Court. The scheme of the New York Public Service Commission Law is very different from that of the Packers and Stock Yards Act of 1921, particularly the provisions in connection with reparations (Sec. 113) and for "immediate" fixing of temporary rates (Secs. 72, 114). The procedure in the State of New York for attacking public utility rate orders is by *certiorari* (N. Y. Civil Practice Act, Secs. 1304-1305), and differs entirely from the procedure of the Urgent Deficiencies Act.

For these reasons it would be inappropriate and of no substantial assistance to the Court for us to attempt to determine whether under New York law these cases were rightly decided. A few observations may, however, properly be made. Perhaps the most striking difference between the New York Public Service Commission Law and the Packers and Stock Yards Act is that in the former no reparations procedure by private suits is provided for. If a public utility company increases its rates the Public Service Commission may cause it as security for reparations in the event the order is finally upheld to give security bond or impounding of the difference between the old rates and the new while it determines the reasonableness of the new rates (Sec. 113). In the *New York Edison* case special or equity term of the Supreme Court stayed the commission's order pending judicial determination of its validity on condition that the company would give such security to repay its customers in the event the Commis-

sion's order was finally upheld. In the *Brooklyn Union Gas* case the Public Service Commission (apparently without statutory authority therefor because no increase in rate was involved) stayed its own order upon a similar condition.

In the New York Public Service Law the amendments recently inserted therein for the fixing of temporary rates provide (Sec. 72) that the Commission "upon such terms, conditions or safeguards as it deems proper may authorize an *immediate* reasonable temporary increase or decrease in such price (of gas or electricity charged by a public service corporation) pending a final determination of the price to be thereafter charged by such person or corporation". Thus, unlike the Packers and Stock Yards Act, the legislation indicates a purpose to have an *immediately* effective temporary rate. It is further provided (Sec. 114) that "the Commission may in any such proceeding brought either on its own motion or upon complaint, upon notice and after hearing, if it be of the opinion that the public interest so requires, *immediately fix*, determine and prescribe temporary rates to be charged by said utility company pending the final determination of said rate proceeding". That is something which Congress may ultimately want to do in connection with the Packers and Stock Yards Act, but the difficulty with appellants' position is that it has not yet done it.


Another vital consideration is that the New York courts are not bound by the constitutional restrictions in Article III of and Amendment VII to the Federal Constitution with respect to judicial power being reposed in the courts and the right to trial by jury. This is highly important, of course, where the question of the Public Service

Commission's power to award reparation by means of impounding orders or bonds, and upon its own motion, is under consideration.

(b) The Immigration Cases.

The two immigration cases cited by the Government, *Mahler v. Eby*, 264 U. S. 34, and *Tod v. Waldman*, 266 U. S. 113, are not in point. The enforcement of the immigration laws is, of course, traditionally a function of the Executive Department and the exigencies of due process are far less exacting in such a field which is so intimately associated with the prerogatives of sovereignty. In the *Mahler* case the missing finding of fact essential to the validity of the warrant of deportation was so obviously inherent in the facts found that a further hearing would be necessary only as a formality. The aliens had been convicted of crime, but the Secretary of Labor had failed to find that they were "undesirable residents of the United States": To permit these aliens under such circumstances to escape, although the Secretary had the full right to rearrest them and conduct another proceeding for their deportation, would, of course, have been foolish. No order made in that further proceeding would be "*nunc pro tunc*" as is proposed and as is essential to the Government's position in our case. An order dated when made would be wholly sufficient to secure the deportation of the immigrant. The order of this Court in the *habeas corpus* proceedings providing for the retention in custody of the immigrant until the Secretary of Labor should make the new finding was analogous to the order of the statutory court in our case requiring the deposit of security to await an event, that is, the decision of the Court whether the Secretary's

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order was valid. The Secretary himself well realizes the vital difference between the two cases because the only order he proposes to make is to be dated as of June 14, 1933.

In the *Tod* case the question concerned the right of immigrants to enter the country. It is, of course, obvious that they could not be given that right by any failure of the Secretary of Labor to accord them a "full and fair hearing". But in our case the market agencies had the clear pre-existing legal right to make the charges made under the filed tariffs in default of their being properly superseded by a validly made order of the Secretary. *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 440; *Penna. R. R. Co. v. International Coal Co.*, 230 U. S. 184, 197; *Louisville & Nashville R. R. v. Maxwell*, 237 U. S. 94, 97-98; *Dayton Iron Co. v. Cincinnati Ry.*, 239 U. S. 446, 451. Here again, just as in the *Mahler* case, the deportation order finally issued would have no retroactive effect. In other words, in our case everything depends upon the time when the order which the Secretary says he will make is entered and in the immigration cases nothing depends upon that. In neither our case nor the immigration cases are "the merits" concluded by any procedural mistake. In both situations the determination of "the merits" is merely postponed thereby.

(c) *The Atlantic Coast Line Case.*

Our opponents attempt to derive some comfort from the decision of this Court in *Atlantic Coast Line v. Florida*, 295 U. S. 301. We have already shown that that was a restitution case and that this is not (Point II, pp. 40, 41 *ante*), which clearly makes it inapplicable.

While appellants do not claim that the case is really in point, they would have us believe that the opinion of the majority in this five-to-four decision squints in their direction. We believe that it can be rather easily demonstrated that it does not even do that, and indeed expressly repudiates the basic assumptions of appellants' theory. It is certain, moreover, that appellants can derive no comfort from the minority opinion written by Mr. Justice Roberts, in which the Chief Justice and Justices Brandeis and Stone concurred.

In the *Atlantic Coast Line* case a schedule was established by the Interstate Commerce Commission to supersede intrastate railroad rates established by the Florida Railroad Commission, known as the Cummer Scale, since it was found that those rates unreasonably discriminated against interstate commerce. A bill to enjoin the order of the I. C. C. was dismissed by the statutory court, but its decree was reversed by this Court, without consideration of the evidence, upon the ground that the order of the Commission was not supported by appropriate findings (*Florida v. United States*, 282 U. S. 194). Thereafter, the Commission reopened its proceedings and upon new evidence and new findings entered another order setting aside the Cummer Scale. A bill to enjoin this order was likewise dismissed by the statutory court and its action was here affirmed (*Florida v. United States*, 292 U. S. 1).

Meanwhile, the shippers applied to the statutory court for restitution of the excess of the rates which they had paid over the rates established by the Cummer Scale while the original invalid order of the I. C. C. had been in effect. The motion for restitution was resisted, but the court awarded restitution measured by the difference between the

charges collected and the lawfully established rate in effect at the time of each shipment in question, referring to a special master the determination of the amount of restitution. Finding the Cummer Scale unreasonable and confiscatory, the master recommended, and the court adopted, an independent determination of what constituted reasonable charges during the period in question, and awarded restitution on that basis.

This Court determined, upon appeal, in a 5-4 decision, that no restitution should have been allowed. ~~The~~ view was taken that the court should not exercise its equitable power to award restitution under circumstances which would result in injustice and determined that the equities lay with the carrier, since the Cummer Scale was unreasonable and confiscatory and since the showing made by the shippers had not sustained their burden of establishing that the charges collected were unreasonable. In reaching this conclusion the Court took into consideration the findings of the I. C. C. upon the new hearing, but, definitely rejected the contention that it was bound thereby.

The minority of the Court (in an opinion written by Mr. Justice Roberts, in which the Chief Justice and Justices Brandeis and Stone concurred) maintained that restitution should have been awarded on the basis of the difference between the charges collected and the Cummer Scale, since the Cummer Scale constituted the lawful rates prescribed by the Florida Railroad Commission and could not be set aside by the court except in a suit brought specifically for that purpose. It was argued that to make an award upon any other basis would constitute an invasion of the rate-making authority of the State.

After the first decision of this Court, which held the order of the I. C. C. increasing its rates to be invalid; the Atlantic Coast Line made a motion in this Court for a stay of mandate or a direction to the statutory court to maintain the *status quo* until the I. C. C. could reopen its proceedings and make proper findings. While it was obvious that unless this should be done the Atlantic Coast Line would in the meantime, until the redetermination by the I. C. C., be compelled to charge the Cummer Scale and would be unable to collect from multitudinous shippers the difference between that scale and the higher rates fixed by the I. C. C., nevertheless this Court refused both the requests. We see no difference between that situation and this one, because the railroad was as much entitled to be protected against the necessity of bringing a multiplicity of suits as are the shippers in this case.

The fundamental basis of appellants' argument is that although the Secretary has not yet validly spoken he can hereafter do so with such retroactive effect as to require the statutory court to exert equitable powers to restore to shippers payments made by them to the market agencies and now constituting the fund impounded in court. The majority opinion in the *Atlantic Coast Line* case, however, expressly disavowed the existence of such a remedy and was confined to approval of inaction on the part of the statutory court. The minority opinion expressed the view that statutory rights cannot be defeated by the consideration of what the majority spoke of as equities even in a properly instituted restitution proceeding and even if the result is merely approval of inaction on the part of the court.

Appellants employ a strange technique in attempting to adapt these two diverse opinions to their purposes. That

technique consists in attempting to obtain the affirmative action of a court by combining what it conceives to be the "spirit" of the majority opinion (despite its clear and unequivocal disavowal that its reasoning permitted anything more than approval of inaction), with the opinion of the minority which insisted that action was necessary to prevent destruction of the legal right to collect rates upon which an invalid administrative order had had no effect.

We may perhaps clarify this in another way. The minority in the *Atlantic Coast Line* case undoubtedly held that until such time as an order of the Interstate Commerce Commission should be validly entered finding the intrastate rates of the Florida Railroad Commission to be discriminatory against interstate commerce, the Florida Railroad Commission's order could not be disturbed. The inevitable consequence was that the Atlantic Coast Line Railroad should make restitution. In that case there were both statutory and constitutional difficulties, the minority thought, in permitting an order of the Interstate Commerce Commission to displace an order of the Florida Railroad Commission until an order should be entered in accordance with the Federal statute and the rules laid down by this Court for judicial review. In our case there are precisely similar difficulties, in displacing the tariff rates filed by appellants. (See cases cited *ante*, p. 108.) No doubt Congress may displace such rates by legislative fiat as to what are just and reasonable rates. But the authority of Congress in such cases has nothing to do with the authority of the Secretary of Agriculture, who is merely its delegate authorized to fix just and reasonable rates in particular situations upon compliance with the condition precedent of a full hearing in accordance with judicial traditions. The statute ex-

pressly forbids such displacement until after it has been validly determined in *quasi*-legislative proceedings that appellees' filed rates are unreasonable and rates "thereafter to be observed" have been validly fixed. The Constitution (Amendment V) as construed by this Court likewise forbids interference with the rates and charges of market agencies until an order shall have been entered after according to the market agencies due process of law in the shape of a full, fair and open hearing.

The theory of the majority opinion in the *Atlantic Coast Line* case is, therefore, of no assistance to appellants if confined to its true *ratio decidendi*, to wit, approval of inaction. Inaction by the statutory court will not accomplish the Secretary's purpose of restoring the impounded funds to the shippers. It will merely result in the enrichment of the Clerk. Appellants therefore turn to the minority opinion and demand affirmative action on the part of the Court on the basis thereof. They then reject the holding of the minority opinion that a defective administrative order cannot supersede existing tariffs. This is indeed a strange and tortuous method of argument. The grotesqueness of the doctrines contended for, however, makes resort to extreme measures a necessity. This disposes of the fundamentally erroneous assumption of appellants when they say:

"But if the court of equity will stay its hand in order to protect the carrier against a technically persuasive claim for reparation, in obedience to the statutory prohibition of discrimination against interstate commerce, so too will it mold its decree to protect the former against dissipation of the impounded funds until the merits of this proceeding have been decided." (Brief, pp. 45-46)

The contention made in this case that the Secretary may affect past transactions by a *nunc pro tunc* order was also made by the carrier in the *Atlantic Coast Line* case, and on the same flimsy foundation, to wit, that although this Court had held the original order of the I. C. C. invalid for lack of proper findings, it had pointed out that the I. C. C. was "still at liberty, acting in accordance with the authority conferred by the statute, to make such determinations as the situation may require" (282 U. S. at 215). The carrier argued that this must mean that when the I. C. C. made the proper findings, the order would be valid, since there would be no necessity for the Court to tell the I. C. C. that it could do what the statute clearly said it could, *viz.*, make a new order prospective in operation. This argument was amplified by the contention, repeated here, that since invalidity was due only to a procedural slip the defect could be corrected *nunc pro tunc*.

But the I. C. C., with a proper appreciation of its limited legislative authority and of its obligation to act in a judicial manner, apparently not shared by the Secretary, did not attempt to make its new order reach into the past. This Court did, however, comment on the railroad's argument. The majority was at pains to point out that when the I. C. C. sets aside discriminatory rates, "the substituted schedule is prospective only, and power has not been granted in such circumstances to give reparation for the past" (295 U. S. at 311) and that "the Commission was without power to give reparation for the injustice of the past" (p. 312) and still further that "we do not suggest that the determination of the Interstate Commerce Commission as to the rates to be operative thereafter had the force of *res judicata* in respect

of past transactions" (p. 317).²² The minority said, "the second and valid order made in 1932 cannot apply retroactively to affect lawful state rates in force prior to its issuance" (p. 327).

Lastly, it may be noted that not a single one of the various considerations which motivated the majority of the court in the *Atlantic Coast Line* case is present in this case. There was no contention in that case that a full hearing had not taken place. The I. C. C. had simply failed to make evidentiary findings to support its ultimate findings of discrimination. This is not a statutory requirement, as is a "full hearing". The only purpose of requiring evidentiary findings is to permit adequate judicial review. The I. C. C. may well have actually formulated evidentiary findings and merely failed to record them. That is a totally different situation from complete failure to accord a full hearing and the automatic acceptance of findings made by the active prosecutors for the Department without giving the market agencies any opportunity to attack them. In the *Atlantic Coast Line* case the I. C. C. had definitely reported that the Cummer Scale of rates obtaining during the restitution period was unreasonably low and confiscatory, in fact, about one-third of what it ought to have been. *Georgia Public Service Comm. v. Atlantic Coast Line*, 186 I. C. C. 157, 193. In our case there is, as we have shown, no indication whatsoever that appellees' filed rates were unreasonable, and every indication to the contrary. In the *Atlantic Coast Line* case, the I. C. C. had held that the charges col-

²²Indeed, a quasi-legislative order such as the Secretary proposes to make can never be *res judicata*. *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 226; *State Commission v. Wichita Gas Co.*, 290 U. S. 561, 569.

lected by the railroad were reasonable. In our case there has been no holding that we ought to have charged the Secretary's rates. In the *Atlantic Coast Line* case there was no contention that during the restitution period there had been any change in conditions, whereas in our case we have filed an affidavit to the effect that there was, as everyone knows, a very radical change in conditions justifying higher charges by appellees (see Point X, subdiv. 4, pp. 136 *et seq.*, *post*). Indeed, the price of beef cattle doubled during this period and the price of hogs tripled, as statistics on file with the Secretary of Agriculture show.

VIII

THE COURT HAD NO POWER TO CONDITION ITS TEMPORARY RESTRAINING ORDERS IN SUCH A WAY AS TO FIX REASONABLE RATES DURING THE IMPOUNDING PERIOD. NOT HAVING DONE SO, IT FOLLOWS A *FORTIORI* THAT IT CANNOT BE COMPELLED TO NOW FIX THEM RETROACTIVELY.

In Points I and II we have shown that the Court did not attempt to condition its temporary restraining order to provide for a distribution of the impounded funds in accordance with reasonable rates to be determined by the Secretary or by it at the conclusion of the litigation. It is elementary that it is discretionary with the Court whether or not to attach conditions to an injunctive order, except as the statutory law may require certain conditions to be attached (Title 28, U. S. Code, Sec. 382). This in reality is the end of the matter. Were it not, however, it is plain that had the Court desired to act otherwise it would have lacked power to condition its temporary restraining

order either upon a subsequent determination by the Secretary or upon a subsequent determination by the Court as to the reasonableness of the charges collected during the impounding period. This being so, it is clear that the Court cannot be compelled to do now that which at the time of the entry of the temporary restraining order it did not attempt to do and would have lacked power to do.

Newton v. Consolidated Gas Co., 258 U. S. 165, at page 177, is an express authority to the foregoing effect. In that case it was held by this Court that it was error for a District Court to impose the condition which appellants assert it ought to have imposed and must now impose, and at page 177 it was said:

"It was error to direct ultimate distribution of the impounded funds in accordance with any subsequently approved rate. Rate making is no function of the courts and should not be attempted either directly or indirectly. After declaring the eighty-cent rate confiscatory, the court should not have attempted, in effect, to subject the Company for an indefinite period to some unknown rate to be proclaimed in the future upon consideration of conditions then prevailing."

While an amendatory decree conditioned upon the impounding of excess collections *pending appeal only* was upheld, *all impounded funds were ordered distributed* when the lower court's decree adjudging the rate confiscatory was upheld (pp. 173, 177-8).

In this case the Court is being asked to read a condition into the temporary restraining order issued by the statutory court which that court disavows. It is said (Govt. Brief, p. 56, footnote) but without any great emphasis that

if the Secretary cannot make a *nunc pro tunc* order the Court should come to his assistance. To do this would, however, require the statutory court to fix reasonable rates. But rate-making is essentially a legislative function. It does not require the application of rules of law to the facts but requires the application thereto of legislative discretion. It has consequently been held in numerous cases that the Court has no power to fix reasonable rates.

Reagan v. Farmers Loan & Trust Company,
154 U. S. 362, at pp. 396-397;

Norwood v. Baker, 172 U. S. 269, at pp. 294-295;

Prentiss v. Atlantic Coast Line, 211 U. S. 210, 226;

Robinson v. B. & O., 222 U. S. 506;

I. C. C. v. Humboldt S. S. Co., 224 U. S. 474, 483;

Louisville & Nashville R. R. v. Garrett, 231 U. S. 298, 305;

Ohio Valley v. Ben Avon Borough, 253 U. S. 287, 289;

Newton v. Consolidated Gas Co., 258 U. S. 165 and 265 U. S. 78;

Great Northern Ry. Co. v. Merchants Elevator Co., 259 U. S. 285, at p. 291;

Terminal R. R. Ass'n v. U. S., 266 U. S. 17, 30;

Central Kentucky Natural Gas Co. v. Railroad Commission, 290 U. S. 264;

Morrell v. Brooklyn Borough Gas Co., 231 N. Y. 398;

Cf. Honolulu Rapid Transit & Land Co. v. Hawaii, 211 U. S. 280;

Keller v. Potomac Electric Co., 261 U. S. 428.

Indeed, it was not even claimed by appellants in their application to the statutory court that it could, without prior recourse having been had to the Secretary, set reasonable rates for the impounding period. The sole proposal made by appellants to that court was that the Secretary should make an order in the reopened proceedings, as of June 14, 1933, and that this order would be conclusive upon the Court in distributing the impounded funds. That court was certainly justified in restricting its consideration to the express request made.

In *Central Kentucky Natural Gas Company v. Railroad Commission of Kentucky*, 290 U. S. 264, the Gas Company had obtained and accepted a franchise to furnish gas to the City of Lexington at just and reasonable rates to be prescribed by the Railroad Commission of the state. The franchise further provided that pending determination by the Commission the Gas Company should charge a temporary rate of 50¢ per thousand, which might be increased to 60¢ per thousand upon the provision of increased services required by the franchise. The franchise further provided that out of the rates collected, whether 50¢ or 60¢, 10¢ "should be impounded under the direction of the Commission pending the determination of a reasonable rate by it". The requisite condition having been met, the temporary rate became 60¢.

The Commission thereafter fixed 45¢ per thousand as a just and reasonable rate and directed that the moneys impounded under its direction be distributed in accordance

with such finding. The Gas Company brought suit to set the order of the Commission aside as confiscatory. The District Court on final hearing found that the 45¢ rate was confiscatory but that a 50¢ rate would be just and reasonable. It consequently conditioned the granting of the permanent injunction, to which the Gas Company had become entitled, upon the Gas Company's consent that the fund impounded in excess of the 50¢ rate found by the court to be reasonable should be distributed to the patrons from whom collected.

So far as appears from the opinion, the court did not undertake to condition the permanent injunction upon the observance by the Gas Company for the future of the rate found by it to be reasonable. In any event the ground upon which the appeal was taken and upon which the case was decided in this Court was that the court had no right to condition permanent relief against an invalid order of the Commission upon the application to the services furnished during the pendency of the proceedings before the Commission and in court of the rate found by the court itself to have been reasonable during the impounding period. This Court reversed. After referring to the power of a court of equity "in the exercise of a sound discretion" to impose conditions upon the relief accorded, the Court said:

"There are nevertheless some limitations upon the extent to which a federal court of equity may properly go in prescribing such conditional relief, which are inherent in the nature of the jurisdiction which it exercises. District courts may set aside a confiscatory rate prescribed by state authority because forbidden by the Fourteenth Amendment, but they are without authority to prescribe rates, both

because that is a function reserved to the state, and because it is not one within the judicial power conferred upon them by the Constitution. See *Newton v. Consolidated Gas Co.*, *supra*; *Reagan v. Farmers Loan & Trust Co.*, 154 U. S. 362, 397; *Honolulu Rapid Transit & Land Co. v. Hawaii*, 211 U. S. 282; *cf. Keller v. Potomac Electric Power Co.*, 261 U. S. 428; *O'Donoghue v. United States*, 289 U. S. 516."

This, be it observed, was said in a case in which the court undertook to condition its final decree upon observance in respect of past transactions of a rate determined by the court to be reasonable. In *Newton v. Consolidated Gas Company*, *supra*, the court had held that a final decree setting a rate order aside could not be conditioned upon the observance of a rate to be thereafter fixed by public authority. In the *Kentucky* case it held that such final decree could not be conditioned upon the disposition of funds impounded in respect of past transactions in accordance with a rate found by the court to have been reasonable therefor. Reading these two cases together, therefore, the court below was without power to require the impounded funds to be disposed of either according to some rate to be hereafter established by the Secretary or some rate to be found by the Court in the instant case to have been a reasonable rate during the impounding period.

In the *Kentucky* case, this Court, having reversed the decree below upon the grounds stated, directed that the impounded funds should be turned back to the custodian appointed by the Commission, by whose order they had been originally impounded, to await its action in fixing a lawful rate. This direction was not given, however, by

reason of any supposed equitable considerations or in the exercise of a power to "mold" the franchise provisions "to effectuate substantive justice" or in the exercise of an assumed power to evolve a "procedural mechanism" to carry out "the cardinal requirement" of the franchise that the rates charged should be just and reasonable. Manifestly the Court directed that the impounded funds should be turned back to the Commission's custodian because the provisions of the contract or franchise required it. They had been impounded originally at the direction of the Commission because the franchise required that they be so impounded and held until such time as the Commission should determine what would be a reasonable rate, then to be disbursed in accordance with such determination. The Commission, although it had attempted to make such determination, had not done so.

The franchise, of course, was a contract to which the Gas Company had agreed and by whose provisions it was bound. Under that contract the impounded funds were to be held pending a final determination by the Commission which had not yet been had. By the strict letter of the franchise, therefore, the Gas Company was not entitled to the possession of the funds by reason of the fact that the Commission's first order had been set aside.

In this case, as we have seen, power to determine the reasonableness of rates covering past transactions, expressly granted to the Commission in the *Kentucky* case by the franchise, has been expressly withheld from the Secretary by Congress. The grounds upon which the direction in the *Kentucky* case that the impounded funds should be held by the Commission's custodian, under whose direction they had been impounded in the first place pending the exercise

of a power expressly conferred upon the Commission but then not yet exercised, are wholly absent in this case.

The fact that that case involved the validity of a rate made by a state commission while this case involves the validity of an order made by the Secretary is of no consequence. This Court has held that the District Court may not under the Interstate Commerce Act (*Texas and Pac. Ry. v. Abilene Cotton Oil Co.*) or, as conceded by the Government (Brief, p. 25) under the Packers and Stock Yards Act (*Sullivan v. Union Stock Yards Company*, 26 Fed. (2d) 60, C. C. A. 8th), determine the reasonableness of charges collected on past transactions except in suits brought to enforce reparation awards theretofore made by the Commission or the Secretary. Manifestly it may not exercise such power where the Commission or the Secretary are themselves prohibited by statute in proceedings instituted on their own motion, to make such an award.

IX

THE COURT AND THE SECRETARY ACTING IN COOPERATION, CANNOT BY ATTEMPTED JOINT ACTION EXERCISE POWERS NOT POSSESSED BY EITHER.

The Government in its last point argues that "sound government requires that courts and administrative agencies cooperate to secure both procedural and substantive rights" (Brief, pp. 71-76). This argument is difficult to follow. While the word cooperation appears in the heading and once in the text, neither the source nor the character of the cooperation proposed is disclosed or described.

It is said that the case involves a consideration of the "broader issues of administrative law" (Govt. Brief, p. 71). But the Government's whole argument in this case would break down that separation of the judicial function and the administrative or legislative function for which the Constitution provides and which has hitherto been the foundation of administrative independence in the past—an administrative independence which the Government itself has been most zealous in guarding. Congress has not undertaken to confer upon the District Courts under either the Packers and Stock Yards Act or the Interstate Commerce Act a supervisory or appellate administrative jurisdiction such as has been conferred upon the highest courts of some states by their constitutions. It once conferred such power upon the Court of Appeals of the District of Columbia in connection with the administration of the Radio Act of 1927 (Sec. 16, 44 Stat. 1169), but quickly withdrew it (Act of July 1, 1930, 46 Stat. 844). What powers the courts would possess under the Packers and Stock Yards Act, Interstate Commerce Act, Federal Trade Commission Act, etc., and how they should be exercised in the present case had Congress seen fit to model them along the lines of either the Virginia Constitution (*Prentis v. Atlantic Coast Line*, 211 U. S. 210) or the old Federal Radio Act, it is therefore unnecessary to consider. It seems doubtful, to say the least, whether such power could be conferred upon the District Court, a constitutional court. At any rate it has not been.

Courts and administrative agencies of the Government are thus compelled by the action of Congress, if not by the Constitution, "to regard each other as things apart" (Govt. Brief, p. 75). *Keller v. Potomac Electric Power Co.*,

261 U. S. 428. Each must recognize the rights of the other in its own sphere, but neither may act within the sphere of the other, delegate to the other any part of its own power, confer upon the other any power not conferred upon it by Congress, or in cooperation with each other exercise powers not conferred upon either.

If the Secretary may now validate his previous order so as to give it a retroactive effect, he does not need the consent or cooperation of the Court. If the Court may condition its final decree upon the settlement of past transactions upon the basis of what it determines to be reasonable rates, it does not require the consent or cooperation of the Secretary. If neither acting alone may bring about the result desired, it should be obvious that they cannot do it by proceeding jointly in the joint exercise of powers carefully withheld from each.

It is said that the Secretary should be permitted to correct his own procedural errors (Govt. Brief, p. 74). Nothing which the Court can do can prevent him from so doing if he has the power to do so and if he does so in the manner prescribed by the statute, and subject to such limitations, if any, as it may impose. So to act requires neither the consent nor the cooperation of the Court. But the Court may not confer upon the Secretary power to correct his error, or to correct it in any manner other than as provided by the statute, or to free him from the limitations placed upon his power by Congress itself.

To be more specific: Unless the Secretary's power to make rates for the future in the proceeding still pending before him has become exhausted, he may, after correcting his errors, do so. If it has been exhausted in this proceeding he may exercise it in another. But in either event

his action will be legislative in character and may speak only as of the future. Whether Congress, proceeding under the Commerce Clause, or a state, in the exercise of its police power, could make a rate to be applicable to past as well as future transactions need not be determined or debated. Congress has forbidden the Secretary to make any rate except "after full hearing". Within this limitation the Secretary may correct his errors without the consent or cooperation of the Court. But what he is seeking is a removal of this limitation. What he wishes to do is to exercise the legislative power conferred upon him by making rates to be operative *before* instead of "after" full hearing. This the statute forbids. And what the statute forbids neither the Secretary nor the Court, acting alone or in cooperation, may provide.

Similarly, had the Act conferred upon the Secretary the power to award reparation in proceedings instituted by him on his own motion, he would not need the consent or cooperation of the Court. He could correct his error and by his own lawful order require ~~past~~ transactions to be settled on the basis of such rates as the Secretary might now find to have been reasonable for the period in question. But Congress has expressly forbidden the Secretary to make any order "for the payment of money" in proceedings instituted by his own motion. A power thus expressly withheld cannot be assumed by the Secretary or conferred upon him by the Court, acting either separately or in cooperation with each other. Since the Secretary's order is to be and must be purely legislative and not quasi-judicial in character, appellees will not be bound thereby in so far as the past is concerned. Such an order cannot be *res judicata*. *Prentiss*

v. *Atlantic Coast Line*, 211 U. S. 210, 226; *State Commission v. Wichita*, 290 U. S. 561, 569.

In this part of its brief (p. 72) the Government also expresses apprehension that unless its position is sustained, orderly administrative process will be impeded and impaired by the "far fetched demands of ingenious counsel" and the timidity of the administrative agencies in dealing with them. The fundamental requirements of administrative procedure are simple and easily understood. They were laid down in the Court's first opinion in this case. They are not a matter of form but of substance. They have been successfully followed and applied in the administration of similar statutes. Any person qualified to bring to an administrative body those expert qualities of which the law assumes him to be possessed, ought to be able to comprehend and apply them if he also has the most elementary conception of the fundamental requirements of a full and fair hearing, especially if he has a staff of lawyers to advise him. But if, by reason of uncertainty in any case, administrative process should be delayed, this is no more than the usual concomitant of cases involving controversial questions, and this Court can easily check any practice of making far-fetched demands. Those which have been sustained by this Court in this case can hardly be classified as such.

But what of the results on the other side? If administrative tribunals may commit error with impunity and then correct it backwards, a premium is put upon snap judgments and a disregard of the fundamental substantive rights of the citizen. It is idle to suggest that no injustice results because upon a new trial the administrative agency will

deal out even-handed justice with an open mind. Theoretically, this may be so. Practically it is not. It is just not in human nature to be so meek and so judicially minded. The fundamental requirements of a full and fair hearing must be met when they first are required to be met, and when the mind of the administrative officer or tribunal is open, if their essentials are to be preserved. Any argument to the contrary is the same argument, based upon "administrative expedition" and "administrative convenience", made twice before in this case and twice rejected—once unanimously, and once with a single dissent.

Neither the Court nor the Secretary, acting jointly with the other, may exercise power which neither acting alone could exercise. Nor may they, acting in co-operation, exercise the legislative power of adding to or supplementing the provisions of the Act itself, especially in a manner directly contrary to the limitations contained in such provisions.

X

THE CONSEQUENCES WHICH WOULD ENSUE FROM A MOLDING OF THE STATUTE IN THE MAN- NER REQUESTED BY APPELLANTS.

Serious consequences other than those just pointed out (pp. 127-128) would also ensue in that the market agencies would be deprived of essential rights guaranteed to them by the Constitution and the statutes while extra-statutory rights and privileges would be conferred upon the shippers. All of this, although to be done in the name of equity, would only succeed in producing a most inequitable result.

1. The Government's theory would deny to the market agencies an impartial trier of the facts.

Indeed, the Government's theory is not at all that the Secretary shall in the reopened proceeding before him consider the evidence and listen to argument with an open mind in order to reach such conclusions as may be justified by the record.²³ This is shown by the fact that we are told by appellants that our fundamental error is in failing to note that the reopened proceeding before the Secretary "is merely ancillary to the original rate proceeding and to the invalidation by this Court of the Secretary's order for procedural error" and in failing to understand that "its only purpose and its only effect is to determine whether, and to what extent, the appellees have been prejudiced by the procedural defect in the earlier proceeding" which it is said "can appropriately be determined only by the Secretary" (p. 16).

Appellants expressly admit that only under the theory advanced by them can it possibly be argued that a *nunc pro tunc* order is permissible. But the theory is obviously untenable. The Secretary's powers are limited by statute, and the statute gives him no power to determine whether or to what extent he has missed the mark in fixing rates without a "full hearing". If it were necessary or appropriate to determine such a question at all, it would clearly be a judicial question determinable by the courts. The "inexorable safeguard which the due process clause

²³Cf. the Secretary's public statement in advance of reconsideration that the impounded funds "rightly belong to the farmer" (Govt. Brief, p. 96).

assures" that "the trier of the facts shall be an impartial tribunal" would become a hollow mockery if an administrative tribunal should be allowed to determine after having denied a "full hearing" whether and to what extent its action had been prejudicial.²⁴ *St. Joseph Stock Yard Co. v. U. S.*, 298 U. S. 38, at page 73 (concurring opinion of Mr. Justice Brandeis); Report of Committee on Ministers' Powers (Great Britain, 1932), page 76, wherein it is said that for one to be a "judge in his own cause" violates "the first and most fundamental principle of natural justice"; *Fitchburg Steam Engine Co. v. Potter*, 211 Ill. 438.

But since this Court has determined that as a matter of law the Secretary's order was a nullity, neither the Secretary nor the Court has any power to pass upon the question of whether or not, or to what extent, that order prejudiced the market agencies. Such determination in any event would be wholly impossible since it is obvious that the determination of reasonable charges for personal services is largely, if not entirely, a matter of discretion and opinion. Such being the situation, it is plain that the argument of appellants to the effect that the Secretary and the courts in cooperation may determine whether or not his prior judgment was correct, and if incorrect to what extent, should be rejected.

²⁴Even in a case reheard after reversal by an equity judge, whose impartiality is not injured by being also a prosecutor, the findings of fact are reviewed by an impartial appellate court upon the weight of the evidence. *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 441; Cyc. of Fed. Procedure, Vol. 6, Secs. 2965, 3027. In a jury case, of course, a new jury always passes on the facts.

2. The Government's theory would confer upon the Secretary power to deprive market agencies of their rights to judicial proceedings before impartial judges and juries in actions for reparation.

Under the reparations sections of the Packers and Stock Yards Act of 1921 (Secs. 308 and 309) the Secretary must be first appealed to. If the defendant does not comply with the Secretary's order for the payment of damages, the complainant may bring an ordinary suit at law in the regular courts. Section 309 (f) provides: "Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and order of the Secretary shall be *prima facie* evidence of the facts therein stated * * *." Amendment VII to the Federal Constitution provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * *". This constitutional provision, of course, entitles the defendant to a jury trial in a reparation suit brought in a Federal court. *Meeker & Co. v. Lehigh Valley Railroad Co.*, 236 U. S. 412, at page 430; *Parsons v. Bedford*, 3 Pet. 433.

Article III of the Federal Constitution vests the judicial power of the United States in courts presided over by judges serving during good behavior. The determination of whether or not the market agencies must reimburse shippers on account of past transactions is essentially judicial in character. *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 226. But irrespective of whether the question is one which cannot be taken from the courts, Congress in enacting the Packers and Stock Yards Act of 1921 clearly thought it to be such. In the case of the earlier and anal-

ogous Interstate Commerce Act, the I. C. C. in the first volume of its reports refused to make reparation awards because it felt that there was a constitutional right to trial by jury in such cases. *Council v. Western & Atlantic R. R. Co.*, 1 I. C. C. 638. In 1889 Congress made provision in such cases for actions at law and trial by jury (25 Stat. 869). The Hepburn Act of 1906 enacted provisions for money awards and suits thereon similar to those which have been incorporated in the Packers and Stock Yards Act (34 Stat. 590).

The three fundamental protections accorded by Congress to the market agencies were first, that the Secretary should not act in reparation proceedings, wherein money awards were to be made, upon his own motion, but should occupy the passive role of a judge; second, that the Secretary's order should be only *prima facie* evidence in the subsequent judicial proceedings which would have to be conducted to realize upon his award; third, that in these subsequent judicial proceedings there should be trial by jury. The right not to have the Secretary act upon his own motion meant, of course, that the market agencies were to be free from harassment as to the past except upon the motion of dissatisfied shippers. *It is directly opposed to the basic argument of appellants that Congress intended that no transactions should be had between market agencies and shippers except at rates fixed by the Secretary of Agriculture.* This provision prohibiting the Secretary from acting upon his own motion apparently was primarily intended to preserve his impartiality as a trier of the facts, it being evidently realized that a judge who is also a prosecutor can hardly be impartial.

If the contentions of the Government in this case were to be upheld by this Court, the market agencies under the Secretary's supervision could in every case be effectively deprived of all of the statutory and constitutional rights we have mentioned by a very simple device.²⁵ All the Secretary or any other administrative tribunal need do is to assume jurisdiction and make a "snap order" reducing existing rates upon little or no evidence or without any judicial consideration of evidence taken before an examiner. In order to prevent such an order from going into effect the market agencies would have to resort to a statutory court under the Urgent Deficiencies Act and there give bond or deposit in court the difference between their existing rates and the Secretary's reduced rates. The Government's argument there would be as here that the "errors" thus committed by the Secretary were mere "procedural slips" and not jurisdictional, and that therefore no obstacle exists to their correction *nunc pro tunc*. He need therefore only accord the "full hearing" at his leisure and then reissue the same order. With the "snap order" thus validated, the impounded funds would then be distributed or the bond realized upon "according to the equities"—that is the "reasonable rates" fixed by the Secretary in his "snap order" now validated. We cannot believe that this Court will sanction a theory which will make possible any such procedure.

²⁵It is, of course, elementary that statutes should always be interpreted, if possible, so as to avoid serious constitutional questions. *Panama R. Co. v. Johnson*, 264 U. S. 375, 390; *Missouri Pacific R. Co. v. Boone*, 270 U. S. 466, 471, 472; *Richmond Screw Anchor Co. v. United States*, 275 U. S. 331, 346; *Blodgett v. Holden*, 275 U. S. 142, 148; *Lucas v. Alexander*, 279 U. S. 573, 577; *Crowell v. Benson*, 285 U. S. 22, 62.

3. The molding of the statute requested by appellants would provide for the shippers an attachment to which they are not entitled and without their giving any security therefor.

The Secretary cannot conduct reparation proceedings upon his own motion but must await complaints from dissatisfied shippers. Such suits are in every sense private suits and the expense of their prosecution must be sustained by the shipper. In this respect they fundamentally differ from quasi-legislative proceedings in the public interest. *Federal Trade Commission v. Klesner*, 280 U. S. 18, 26.

In such reparation proceedings, no shipper could in any way obtain security against any market agency, whether solvent or insolvent, in advance of recovery of a judgment. Appellants nevertheless argue that the shippers in this situation are entitled to what amounts to an attachment of the impounded funds pending the making of a further order by the Secretary fixing rates *nunc pro tunc*.²⁶

²⁶Since in neither event can the statute be molded in order to "evolve" an additional "procedural mechanism" for the accomplishment of justice more perfect than Congress has provided, it is unnecessary to determine whether or not the statute of limitations has run upon claims for reparation. That question may only be determined in properly instituted reparation proceedings. It may, however, be said, contrary to appellants' contention, that no obstacle ever existed to the timely filing of reparation claims, although doubtless the Secretary would have seen fit not to act thereon unless and until the order of June 14, 1933, was invalidated. The mere filing thereof would certainly not be burdensome.

The statute of limitations is ninety days (Section 309(a)). A year has elapsed since this Court invalidated the Secretary's order and ten months have elapsed since the

Putting to one side the fact that unliquidated damage claims do not ordinarily entitle plaintiffs to attachments, the remarkable fact is to be noted that no security is offered

statutory court ordered the impounded funds released. It is, therefore, idle to suggest, as do appellants in a footnote to page 29 of their brief, that this Court should order the retention of the entire impounded fund for an indefinite time for disposition in accordance with orders to be made by the Secretary in reparation proceedings which may or may not be brought. This would involve a wider and still more untenable construction of the phrase "pending final disposition of this cause", for a leading argument of appellants is based upon the contention that the reopened proceeding before the Secretary is not a "*new* rate proceeding" (Italics the Government's), and the only request made to the statutory court was to retain the impounded funds pending the making of a *nunc pro tunc* order in this "old" proceeding.

Without undertaking to argue that question, it is plain to be seen that appellants' arguments with respect to the statute of limitations are based upon a fundamental misconception with relation to the impounded funds. When the rates fixed in the Secretary's invalid order were enjoined by the Court, the market agencies were fully authorized to and did collect their filed rates and could have collected no other under pain of civil and criminal penalties (Section 306). The deposits made by them in court, while equivalent to the difference between the collections which would have been made under the rates in the Secretary's invalid order and under their filed rates, were not necessarily any part of their collections. The deposits were made as security, for that is what the statute (28 U. S. C., Section 382) requires.

It would appear therefore, although it is unnecessary to decide the question upon this appeal, that the causes of action for reparation arose not later than the various times when payment was made to the market agencies of their filed charges. If this be not so, however, a much fewer number of suits on the part of the shippers would be required than if they had in accordance with the statute filed reparation claims every ninety days.

against the attachment being improvident as it well may be if the Secretary finds after full hearing that the tariff rates of appellees are just and reasonable. The consequence of appellants' argument thus is to extend the security given by appellees far beyond the purpose for which it was given, while at the same time refusing any security to appellees against an attachment of their funds for an indefinite period. The last named consequence results from the fact that the Secretary acts on his own motion for essentially private purposes, but acting in the name of the Government apparently need give no security. (Cf. Federal Rules of Civil Procedure, Rule 65 (c).) To the above mentioned considerations should be added the fact that the judge in the cause who is to determine the disposition thereof is the one who demands the attachment on behalf of litigants before him.

4. It would be grossly inequitable for the Court to distribute the impounded funds in accordance with an order of the Secretary made *nunc pro tunc* as of June 14, 1933.

The only suggestion made by the Secretary to the statutory court in demanding that it retain the impounded funds was that he would proceed in the reopened proceedings to make a new rate order as of June 14, 1933, which, he asserted, would conclusively govern the Court in the distribution of the funds impounded during the period July 22, 1933 to November 1, 1937 (R. 185).

The basis for this suggestion on the part of the Secretary is that equity would thus be done. It is clear, however, that the distribution of the impounded funds in ac-

cordance with any such proposal would be wholly inequitable and unjust. The \$586,000 in the impounded fund in court was all derived from transactions taking place between July 22, 1933 and November 1, 1937. The Secretary's invalid order made June 14, 1933 was based upon conditions obtaining in the test year 1931 and in some part of the year 1932 preceding the termination of the hearings in that year. Conditions in the test year 1931, a depression year, were, as is common knowledge, entirely different from conditions in the period between July 22, 1933 and November 1, 1937. In the months preceding June 14, 1933, Congress had passed legislation of the most monumental consequence in the economic field, including the National Industrial Recovery Act, the Agricultural Adjustment Act, and the gold and monetary legislation. The Roosevelt administration soon became dedicated to a policy of raising prices. In January, 1934, the dollar was devalued by 40%. In the subsequent years serious droughts took place in the agricultural districts. It is common knowledge, as the statistics of the Department of Agriculture show, that during these years the price of beef cattle nearly doubled, and the price of hogs nearly tripled.

To distribute the impounded funds in accordance with a rate now made by the Secretary on the basis of the old record based on the test year 1931 and part of 1932 would obviously be inequitable. In the making of such an order it is impossible for the Secretary to consider actual conditions during the impounding period, for it would be absurd for a legislative order dated June 14, 1933, to be based in part on conditions obtaining during the subsequent four years.

It is obvious, as the history of the times since June 14, 1933 clearly shows, that by June 14, 1933 forces had been set in motion which were very likely indeed to make rates reasonable on the basis of the depression years 1931 and 1932 much too low in the ensuing years. Certainly persons who had all of their transactions in the near boom years 1936 and 1937 could hardly insist that the market agencies were not fully entitled to charge rates considerably higher than those made on the basis of the depression years 1931 and 1932. Indeed, as the record shows, the Secretary officially admitted on November 1, 1937, that conditions had changed to such an extent as to justify new and higher rates, and ordered such rates into effect, the appellees consenting.

It thus appears that the Secretary's proposed course can under no circumstances do equity, and neither he nor anyone else before the release of the impounded funds by the statutory court urged any other course upon that court.

5. Acceptance of appellants' contentions would result in a dangerous extension of the Secretary's already great power to fix maximum wages.

A complete formula for the economic domination and dictatorial control of labor by government is established if the contentions now advanced by appellants be accepted. This statement is no sterile abstraction because concrete demonstration of its accuracy is presented by the factual background of this case. The service rendered by appellees is personal service. They are skilled workers, nothing more and nothing less. The compensation to be fixed represents the maximum, not the minimum, wage to be paid by their clients, the employers. The compensation paid is the eco-

conomic lifeblood of labor, whether it be measured in terms dependent upon the period of service or upon the units of service performed. The "piece-work" system, common to the sweatshops, and the "speed-up" are frequent in industry. Fix the compensation per unit of service at a figure which will provide a fair or living wage only when a standard of performance beyond the capacity of the efficient worker is attained and labor is denied a fair wage. Such a standard of performance, far above that shown to have been actually attained by any salesman of cattle on a market where the annual volume of cattle handled per agency was twice the average national volume per agency, was prescribed by the Secretary's invalid order if the annual compensation per salesman the order recognizes as fair was to be earned by the worker. As the statutory court said:

"In this case the Secretary employed hypothetical costs based not upon present but upon *assumed* conditions which he expects may exist at some future time."

And this Court has said (304 U. S. 1, 20):

"It is idle to say that this was not a proceeding in reality against the appellants when the very existence of their agencies was put in jeopardy. Upon the rates for their services the owners depended for their livelihood, and the proceeding attacked them at a vital spot. This is well shown by the fact that, on the merits, appellants are here contending that under the Secretary's order many of these agencies, although not found to be inefficient or wasteful, will be left with deficits instead of reasonable compensation for their services and will be compelled to go out of business. * * * While we are not now dealing

with the merits, the breadth of the Secretary's discretion under our rulings applicable to such a proceeding (*Tagg Bros. & Moorhead v. United States*, 280 U. S. 420; *Acker v. United States*, 298 U. S. 426) places in a strong light the necessity of maintaining the essentials of a full and fair hearing, * * *."

Judge Van Valkenburgh describes the power exercised by the Secretary as one "almost dictatorial" in character (R. 239). When authority so vested is further implemented by recognition of the power, in the event the full and fair hearing so required be denied, to make a retroactive order, such authority becomes wholly dictatorial.

When on June 14, 1933, the Secretary made his order, now declared invalid, the market agencies were confronted with the necessity of determining whether or not to remain in business. They knew that to do so under the rates fixed in the order issued by the Secretary would be ruinous. They felt that the rates which they were charging were entirely reasonable, since they were admittedly 10% less than those approved by a former Secretary (R. 133). They were advised by their counsel and as it proved, correctly, that the Secretary's order was invalid. Those who continued in business after challenging the Secretary's order knew that during the period of the challenge they could collect their filed rates and could, under the law as it then existed, expect that if successful upon the challenge they could retain them. Indeed, the Solicitor General in his original argument to this Court admitted that there was no precedent for the Government's position that the Secretary was empowered to make a *nunc pro tunc* order. If the molding of the statute requested by appellants should be acceded

to by this Court, then in similar circumstances in the future market agencies in continuing business will not only have to gamble upon the correctness under the law of their challenge to an administrative order but will have to speculate as to what rates the Secretary, in his practically uncontrolled discretion, himself will set for the period of the litigation when, as and if he elects to set rates himself as the result of a judicial consideration of evidence and argument, instead of leaving the matter to subordinates. This would certainly be government by men and not by laws.

To require the market agencies to gamble upon such a contingency as the price of challenging an invalid administrative order would be unfair and unjust in the extreme. It would deny them all practical benefit of judicial review of administrative orders no matter how arbitrarily made. The right of a full and fair hearing before an administrative tribunal is valueless and is no longer in fact an "inexorable requirement" of due process of law unless supported by a practical mode of enforcement involving no penalty in the event of success, such as a redetermination *nunc pro tunc* before an administrative authority rendered hostile by the very fact of successful challenge.

We have *upon the facts* an instance of the application of power and authority of government arbitrary in character, not to the protection of a reasonable return upon property or to the determination of minimum rates of pay for the worker under the police power but to the fixation of the maximum compensation for the worker permissible under law. If the contentions of the appellants be accepted, "the ever shifting boundary between freedom and authority" will have been moved to a point where authority has become all-comprehensive.

XI

EVERY AVAILABLE INDICATION IS THAT APPELLEES' RATES WERE REASONABLE AND NO MIS-CARRIAGE OF JUSTICE REQUIRES THE IMPROVISATION OF AN EXTRA-STATUTORY REMEDY.

Appellants claim that it was mandatory for the statutory court to refuse to release the impounded funds to appellees and for it to retain these funds for an indefinite period until a further order made by the Secretary should be sustained or set aside in the courts, and not merely discretionary with the Court to release or retain the funds. It is obvious, however, that much of the material contained in their brief can have no possible relation to the mandatory argument. The probable reasonableness or unreasonableness of appellants' rates, for example, could not possibly condition the application of a mandatory rule.

The attempt of appellants to make use of the discretionary theory by indirection makes a brief reply to their unfounded claims desirable. These claims are summed up in the expression used by them that "every available indication points to the validity of the Secretary's order" (Brief, p. 21) and hence, it is implied, to the unreasonableness of the charges collected by the appellees during the impounding period. In order to comprehend how unjustified these claims are, it is necessary to briefly consider the history of appellees' charges, the character of the order made by the Secretary of Agriculture on June 14, 1933, and the subsequent court proceedings instituted for the purpose of setting it aside.

1. The history of appellees' rates indicates the reasonableness of the charges collected.²⁷

Appellees buy and sell livestock as agents for others, their clients, at the Kansas City stockyards. Their principals are the producers and shippers of livestock. Appellees deal principally with the buyers for the packers. It is not ordinarily, if ever, practicable for the shippers to give appellees price instructions. They are therefore under a duty as fiduciaries to buy and sell at the prices which are in their opinion the most favorable obtainable for their principals. These prices vary widely between different grades of livestock and from time to time. For the shipper everything depends upon the efficiency and thoroughness with which the bargaining process is conducted. Appellees' compensation is, however, not in any way dependent upon the prices obtained, but is fixed at so much per head of livestock and was formerly fixed at so much per car of livestock. Some of the appellee market agencies are large concerns, handling a greater volume of livestock than the total received at many public stockyards. Others are medium-sized businesses, and still others are one-man concerns.

Prior to the enactment of the Packers and Stock Yards Act of 1921 the charges of appellee market agencies were unregulated. That Act gave the Secretary of Agriculture the quasi-legislative power, either upon complaint of others or upon his own motion, to enter upon rate investigations

²⁷It is not believed that the statements contained in this subdivision can or will be disputed. The subject-matter, with record references, is generally covered in our prior briefs in *Morgan v. U. S.*, No. 686, Oct. Term, 1935, and No. 581, Oct. Term, 1937.

and if he found existing charges unreasonable to regulate these rates for the future, but only "after full hearing". It also gave him the quasi-judicial power, but only upon specific complaint, to make reparation awards for a very brief period in the past, which should be *prima facie* evidence in subsequent court proceedings provided for in the Act.

During the World War period from 1913 to 1919, when appellees' charges were unregulated, they were increased by only 10% despite increases of approximately 200% in the cost of living, farm wages, general hourly wages, and livestock prices. This was expressly admitted in the Secretary's answer to appellees' petitions filed in the statutory court to set aside his order (R. 133).

Shortly after the Packers and Stock Yards Act of 1921 became effective the then Secretary of Agriculture Henry C. Wallace, who was the present Secretary's father, upon complaint, entered into an investigation pursuant to the Act to determine the reasonableness of appellees' rates which theretofore had been unregulated. This resulted in the entry of an order in July, 1923, reducing these rates by about 15% (R. 212-230).

At that time the volume of livestock production was very high and livestock prices very low. Livestock production and market receipts declined (to the disadvantage of the market agencies) and livestock prices went to much higher levels (to the advantage of the shippers) in the years 1924 to 1929, but the rates set in July, 1923, continued in effect until the spring of 1930, when the investigation with which we are here concerned was entered into upon the motion of the Secretary and not upon complaint. At that time they amounted to but $\frac{3}{100}$ of 1% of gross proceeds.

The Secretary's order of inquiry which instituted this investigation did not charge that the charges previously fixed and held reasonable by the former Secretary were then unreasonable. It merely ordered an investigation to inquire into the reasonableness of these charges (R. 21). That investigation was based upon the test year 1929, a year when the country as a whole was enjoying great prosperity. By the time the hearings had been completed and the Secretary was prepared to make an order the country was deep in the depression of 1931-1932. Livestock receipts continued to decline. In May, 1932, appellees, taking cognizance of this fact, and for other reasons that do not fully appear of record, made a reduction in these rates and filed tariffs with the Secretary to yield 10% less than the rates which Secretary Henry C. Wallace had ordered into effect in 1923. This is expressly admitted by Secretary Henry A. Wallace in his answer to the petition to set aside his order (R. 133). If it had not been for an error of some subordinates of the Secretary, who reported in 1932 that a reduction of but 4% had been attained (see R. in No. 581, Oct. Term, 1937, I, 916), it is probable that these proceedings would have terminated with the filing of appellees' charges which are now so unfairly termed unreasonable. The Secretary did not elect to suspend these newly filed charges for the period allowed by the Act pending the conclusion of the hearing.

Appellees then petitioned for a rehearing based upon changed conditions since the test year 1929, in accordance with the doctrine of the *Atchison, Topeka & Santa Fe* case (284 U. S. 248). A rehearing was ordered, after the Secretary had voluntarily set aside a rate-fixing order made

in May, 1932, and hearings were then conducted with the test year 1931 as a basis, a year of marked depression.

2. The proceedings resulting in the making of the invalid rate order by the Secretary and in the impounding indicate the reasonableness of appellees' rates and the unreasonableness of the Secretary's purported rates.

Three and a half months after entering office, to wit, on June 14, 1933, Secretary Henry A. Wallace signed and issued the order which has been the subject of this controversy. As the hearings terminated in the fall of 1932, the record contained no evidence concerning conditions after that year.

This order, signed by Secretary Henry A. Wallace, drastically cut appellees' rates. His subordinates, who actually made the order, refused to be controlled or even to be guided by the actual costs of doing business of even the most efficient market agencies at the stockyards, although they made no finding that any of the market agencies there were inefficient. They thrust aside the actual selling performance of even the most efficient firms and salesmen in favor of the highly improper opinion evidence of two or three witnesses of dubious qualifications as to what might have been accomplished per salesman in 1929 if each salesman had been continuously supplied with an unlimited amount of livestock to sell. The theoretical figure for selling performance given by one of these witnesses, manager of a cooperative agency financed by the Government, was approximately the same as the total actually achieved by all four salesmen he employed for this concern.

The net result was rates which would yield a net return for each of the 136 owners of the 61 firms then in business of 48¢ per day and deficits for the two largest concerns at the yards, John Clay & Co. and Swift & Henry Livestock Commission Company, each doing a gross business of over \$10,000,000 a year. Inability to have the use of the impounded funds, representing the difference between the Secretary's rates and filed rates, has largely contributed to driving out of business one-fourth of the market agencies operating at the time of the Secretary's order.

The stockmen, who are not shown to have complained of the former rates approved by Secretary Henry C. Wallace (which were ten per cent. higher), were evidently satisfied with the rates in the tariffs filed by appellees in May, 1932, and continued to patronize these agencies at the new and lower rates. Thus, the impounded fund itself evidences the desire to continue to patronize appellee market agencies because the Government-financed cooperative agency and another larger cooperative, with disastrous effect upon their own finances charged the Secretary's lowered rates during the period of the impounding, and all shippers were free to ship to them. It is manifest, therefore, that those from whom the filed rates were collected by appellees did not care to avail themselves of the lowered rates of competitive agencies.²⁸

²⁸It is not to be contended that the clients who employed appellees during the period June 14, 1933 to November 1, 1937 were under any degree of compulsion so to do. These clients could sell their livestock direct to the packing plants adjacent to the stockyards (and such sales are made in large volume) without the assistance of any sales agent and without the payment of any expense for stockyards services, or they could avail themselves of the services of the large co-

As it was plain that they could not live under the rate fixed in the Secretary's order of June 14, 1933 and continue to render efficient service, the market agencies promptly filed a petition in the statutory court to set aside this order. To prevent irreparable injury to them by reason of inability to collect from thousands of shippers in the event the Secretary's orders should eventually be set aside, appellees, as they are given the right to do by law, asked for and obtained temporary restraining orders conditioned upon their depositing with the statutory court sums equal to the difference between what they should collect under their filed charges and what they would have collected under the Secretary's charges (R. 130). This impounding continued to November 1, 1937, when the Secretary, recognizing changed conditions, agreed with the remaining market agencies (many having been forced to discontinue operation) upon rates substantially higher than those fixed in the order of June 14, 1933.

It readily appears from the foregoing that "every available indication" is to the effect that the appellees' charges

operative selling agencies upon the stockyards (at the lower charges prescribed by the Order) or they could have sold the livestock at any one of a very large number of smaller public markets, close to their farms and ranches (the agents upon these markets charged substantially higher rates than those of appellees). It inevitably follows that appreciation of the efficiency of appellees' selling services as compared with that of other agencies, both on and off the market, accounts for the payment to appellees by their clients of the charges, the amount of which determined the amount of the funds impounded as security. It must also be borne in mind that equality of bargaining can only be maintained between the livestock grower and the packer when the salesman of the grower and the buyer of the packer are men of comparatively equal ability to judge the values of the numerous grades of livestock handled.

during the impounding period were not unreasonable. The Government nevertheless argues to the contrary (Brief, pp. 20-23). In respect of the hearings held it is said (p. 21), "The proceedings before him explored the issue with great detail— * * *. The Secretary made elaborate findings." The first of these statements, which refers to findings made by the Secretary's subordinates, is a half-truth because the findings ignore and fail to mention evidence favorable to appellees. The Secretary, who is the only person authorized to judicially pass upon the case, himself testified that he merely "thumbed through" and "dipped into" the record. The second statement is untrue, for the Secretary made no findings at all, although he rubber-stamped those of our adversaries, the prosecutors for the Government. This disingenuous attempt to show that the findings signed by the Secretary purporting to fix reasonable rates for appellees are valid by "every available indication" despite the holding of this Court must therefore be totally rejected.

3. The statutory court found that the Secretary's rates were arbitrarily arrived at.

A like conclusion must be drawn with respect to the attempts in the brief (pp. 21-22) to make use of the statutory court's holdings. It is claimed (p. 20) that the majority of the District Court on the first hearing found that the Secretary's findings were sustained by the weight of the evidence. The statement of the majority of the statutory court in the first opinion which is quoted in the brief is far from satisfactory in that it commences by "presuming that the findings of the Secretary are correct" and concludes with an admission that only so much of the testimony had been ex-

amined "as reasonably can be made, in view of its immense volume." Whatever consideration, however, such a statement would otherwise be entitled to, the opinion of the majority of the Court a few months later upon rehearing washes away.

In this opinion (referred to in the motion of appellees) written by Judge Van Valkenburgh (R. 240), he said: "Further consideration upon this petition for rehearing convinces that in the instant proceeding the Secretary has departed from the method employed in the *Tagg* case in the particulars pointed out by the petitioner, as stated above". Among these contentions made by the petitioner were that "the Secretary's order eliminates essential competitive costs" and "With this elimination agencies cannot compete at a profit", and that "The Secretary employed an unreasonable arbitrary, and illegal method in finding total unit costs; through combining separate reasonable functional unit costs; in this manner eliminating all competitive costs for ratemaking purposes in disregard of actual experience, basing rates on hypothetical considerations and assumed conditions * * *" and that "This results in the establishment of a monopoly of the market and stifles competition in buying and selling upon the market, tends to weaken and ultimately to destroy the market by diverting business to other more favored markets and agencies, and the undue restriction of the agencies enabled to operate profitably."

Judge Van Valkenburgh further says: "That the Secretary did not, as was done in the *Tagg* case, use typical experience as his guide for determining reasonable costs for rate-making purposes", but "hypothetical costs based not upon present but upon assumed conditions which he

expects may exist at some future time. In my separate opinion, when this case was first decided, I called attention to the unfortunate method employed in fixing the salaries of salesmen and other employees". He further said: "Furthermore, I think the drastic reduction of advertising and other costs essential to getting and maintaining business gives scant consideration to the reasonable necessities of the situation as disclosed by experience. I fear the effect of these methods employed may, as suggested by petitioners, tend to weaken and ultimately to destroy this market by diverting business to other more favored markets and agencies and may tend further to the undue restriction of agencies enabled to operate profitably, a result injurious not only to this market but equally to the shippers of stock who would most conveniently patronize it". He then says that he finds himself in full agreement with Judge Wilkerson in the case of *Acker v. United States*, where Judge Wilkerson said: "I do not concur in the findings of this Court, which adopt *in toto* the findings of fact made by the Secretary of Agriculture. Some of them, particularly those relating to salesmanship costs and allowances for business getting and maintaining expenses, are, in my opinion, against the weight of evidence".

Judge Reeves at the end of Judge Van Valkenburgh's opinion, said: "I fully concur in the foregoing Memorandum." This full concurrence is characterized by our opponents (p. 21) by saying that upon rehearing Judge Reeves "appears to have wavered somewhat as to the reasons for dismissing the bill". Appellants, who contend that justice and equity so attend their cause as to demand that this Court overrule plain statutory provisions, do not exhibit that frankness and fairness in the presentation of facts

that should inseparably attend the presentation of such an issue.

Next it is said (p. 22) that the majority of the Court on the second hearing after remand by this Court stated that they had reached the same conclusion "on the merits as to the facts and law as those heretofore announced and we incorporate them herein by reference." Since this statement was made on July 2, 1937, and this Court had decided the *Acker* case in March, 1936, the Court was fully advised by the Government's brief that it had no power to go into the weight of the evidence since no issue of confiscation was involved. All that this statement can therefore possibly mean is that the Court still held to the former opinions of the majority, and believed that there was evidence to support the Secretary's findings.

Thus, the statements (p. 22) that "The Secretary, and on two occasions the district court, have affirmatively declared the rates fixed in his order to be reasonable" and "if Section 305 is to be given any meaning, we do not see upon what basis—in the face of this consistent record of determinations that the funds collected from the farmers were in excess of a reasonable rate—the appellees can be given the impounded funds," and "the order of the court below, directing payment to the appellees, denies the substantive rights of the farmers not only without a determination that the rates charged by appellees were reasonable, but in direct disregard of three determinations to the contrary," must be wholly rejected. Of the statement that "No court or tribunal has held them to be unreasonable," it of course can be said that no court has the power to pass upon such a question, as nobody knows any better than our opponents.

CONCLUSION

It is respectfully submitted that the appeal should be dismissed or in the alternative that the order of the statutory court should be affirmed.

Respectfully submitted,

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APPENDIX

Packers and Stock Yards Act, 1921, as amended.

(7 U. S. C., c. 9, Sections 181-229; c. 64,
42 Stat. 159, et seq.)

Title III.—Stockyards

• SEC. 301. When used in this Act—

(a) The term “stockyard owner” means any person engaged in the business of conducting or operating a stockyard;

(b) The term “stockyard services” means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock;

(c) The term “market agency” means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services; and

(d) The term “dealer” means any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser.

SEC. 302. (a) When used in this title the term “stockyard” means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. This title shall not apply to a stockyard of which the area normally available for handling livestock, exclusive of runs, alleys, or passage ways, is less than twenty thousand square feet.

(b) The Secretary shall from time to time ascertain, after such inquiry as he deems necessary, the stockyards which come within the foregoing definition, and shall give

notice thereof to the stockyard owners concerned, and give public notice thereof by posting copies of such notice in the stockyard, and in such other manner as he may determine. After the giving of such notice to the stockyard owner and to the public, the stockyard shall remain subject to the provisions of this title until like notice is given by the Secretary that such stockyard no longer comes within the foregoing definition.

SEC. 303. After the expiration of thirty days after the Secretary has given public notice that any stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, no person shall carry on the business of a market agency or dealer at such stockyard unless he has registered with the Secretary under such rules and regulations as the Secretary may prescribe, his name and address, the character of business in which he is engaged, and the kinds of stockyard services, if any, which he furnishes at such stockyard. Whoever violates the provisions of this section shall be liable to a penalty of not more than \$500 for each such offense and not more than \$25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

SEC. 304.¹ It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard: *Provided*, That in any State where the weighing of livestock at a stockyard is conducted by a duly authorized department or agency of the State, the Secretary, upon application of such department or agency, may register it as a market agency for the weighing of livestock received in such stockyard, and upon such registration such department or agency and the members thereof shall be amenable to all the requirements of this act, and upon failure of such department or agency or the members thereof to

¹Amended by an act of Congress approved May 5, 1926.

comply with the orders of the Secretary under this act he is authorized to revoke the registration of such department or agency and to enforce such revocation as provided in section 315 of this act.

SEC. 305. All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful.

SEC. 306. (a) Within sixty days after the Secretary has given public notice that a stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, the stockyard owner and every market agency at such stockyard shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing all rates and charges for the stockyard services furnished by such person at such stockyard. If a market agency commences business at the stockyard after the expiration of such sixty days such schedules must be filed before any stockyard services are furnished.

(b) Such schedules shall plainly state all such rates and charges in such detail as the Secretary may require, and shall also state any rules or regulations which in any manner change, affect, or determine any part or the aggregate of such rates or charges, or the value of the stockyard services furnished. The Secretary may determine and prescribe the form and manner in which such schedules shall be prepared, arranged, and posted, and may from time to time make such changes in respect thereto as may be found expedient.

(c) No changes shall be made in the rates or charges so filed and published, except after ten days' notice to the Secretary and to the public filed and published as aforesaid, which shall plainly state the changes proposed to be made and the time such changes will go into effect; but the Secretary may, for good cause shown, allow changes on less

than ten days notice, or modify the requirements of this section in respect to publishing, posting, and filing of schedules, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

(d) The Secretary may reject and refuse to file any schedule tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Secretary shall be void and its use shall be unlawful.

(e) Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge, the Secretary may either upon complaint or upon his own initiative without complaint, at once, and, if he so orders, without answer or other formal pleading by the person filing such schedule, but upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, charge, regulation, or practice, and pending such hearing and decision thereon the Secretary, upon filing with such schedule and delivering to the person filing it a statement in writing of his reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, regulation, or practice goes into effect, the Secretary may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing can not be concluded within the period of suspension, the Secretary may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, charge, regulation, or practice shall go into effect at the end of such period.

(f) After the expiration of the sixty days referred to in subdivision (a) no person shall carry on the business of a

stockyard owner or market agency unless the rates and charges for the stockyard services furnished at the stockyard have been filed and published in accordance with this section and the orders of the Secretary made thereunder; nor charge, demand, or collect a greater or less or different compensation for such services than the rates and charges specified in the schedules filed and in effect at the time; nor refund or remit in any manner any portion of the rates or charges so specified (but this shall not prohibit a cooperative association of producers from bona fide returning to its members, on a patronage basis, its excess earnings on their livestock, subject to such regulations as the Secretary may prescribe); nor extend to any person at such stockyard any stockyard services except such as are specified in such schedules.

(g) Whoever fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall be liable to a penalty of not more than \$500 for each such offense, and not more than \$25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(h) Whoever willfully fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall on conviction be fined not more than \$1,000, or imprisoned not more than one year, or both.

SEC. 307. - It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

SEC. 308. (a) If any stockyard owner, market agency, or dealer violates any of the provisions of sections 304, 305, 306, or 307, or of any order of the Secretary made under

this title, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(b) Such liability may be enforced either (1) by complaint to the Secretary as provided in section 309, or (2) by suit in any district court of the United States of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

SEC. 309. (a) Any person complaining of anything done or omitted to be done by any stockyard owner, market agency, or dealer (hereinafter in this section referred to as the "defendant") in violation of the provisions of sections 304, 305, 306, or 307, or of an order of the Secretary made under this title, may, at any time within ninety days after the cause of action accrues, apply to the Secretary by petition which shall briefly state the facts, whereupon the complaint thus made shall be forwarded by the Secretary to the defendant, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be specified by the Secretary. If the defendant within the time specified makes reparation for the injury alleged to be done he shall be relieved of liability to the complainant only for the particular violation thus complained of. If the defendant does not satisfy the complaint within the time specified, or there appears to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary to investigate the matters complained of in such manner and by such means as he deems proper.

(b) The Secretary, at the request of the livestock commissioner, board of agriculture, or other agency of a State or Territory having jurisdiction over stockyards in such State or Territory, shall investigate any complaint forwarded by such agency in like manner and with the same authority and powers as in the case of a complaint made under subdivision (a).

(c) The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of this title, or concerning which any question may arise under any of the provisions of this title, or relating to the enforcement of any of the provisions of this title. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money.

(d) No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(e) If after hearing on a complaint the Secretary determines that the complainant is entitled to an award of damages, the Secretary shall make an order directing the defendant to pay to the complainant the sum to which he is entitled on or before a day named.

(f) If the defendant does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may within one year of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the defendant, or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Secretary in the premises. Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders of the Secretary shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's

fee to be taxed and collected as a part of the costs of the suit.

SEC. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and non-discriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.

SEC. 311. Whenever in any investigation under the provisions of this title, or in any investigation instituted by petition of the stockyard owner or market agency concerned, which petition is hereby authorized to be filed, the Secretary after full hearing finds that any rate, charge, regulation, or practice of any stockyard owner or market agency, for or in connection with the buying or selling on a commission basis or otherwise, receiving, marketing, feeding, holding, delivery, shipment, weighing, or handling, not in commerce, of livestock, causes any undue or

unreasonable advantage, prejudice, or preference as between persons or localities in intrastate commerce in livestock on the one hand and interstate or foreign commerce in livestock on the other hand, or any undue, unjust, or unreasonable discrimination against interstate or foreign commerce in livestock, which is hereby forbidden, and declared to be unlawful, the Secretary shall prescribe the rate, charge, regulation, or practice thereafter to be observed, in such manner as, in his judgment, will remove such advantage, preference, or discrimination. Such rates, charges, regulations, or practices shall be observed while in effect by the stockyard owners or market agencies parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

SEC. 312. (a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce at a stockyard, of livestock.

(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subdivision (a), the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist.

SEC. 313. Except as otherwise provided in this Act, all orders of the Secretary under this title, other than orders for the payment of money, shall take effect within such reasonable time, not less than five days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, according as is prescribed in the order, unless such order is suspended or modified or set

aside by the Secretary or is suspended or set aside by a court of competent jurisdiction.

SEC. 314. (a) Any stockyard owner, market agency, or dealer who knowingly fails to obey any order made under the provisions of sections 310, 311, or 312 shall forfeit to the United States the sum of \$500 for each offense. Each distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense. Such forfeiture shall be recoverable in a civil suit in the name of the United States.

(b) It shall be the duty of the various district attorneys, under the direction of the Attorney General, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

SEC. 315. If any stockyard owner, market agency, or dealer fails to obey any order of the Secretary other than for the payment of money while the same is in effect, the Secretary, or any party injured thereby, or the United States by its Attorney General, may apply to the district court for the district in which such person has his principal place of business for the enforcement of such order. If after hearing the court determines that the order was lawfully made and duly served and that such person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person, his officers, agents, or representatives from further disobedience of such order or to enjoin upon him or them obedience to the same.

SEC. 316. For the purposes of this title, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title.

**The Urgent Deficiencies Act
(28 U. S. C.)**

47. *Interlocutory injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court.*—No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: Provided, That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such

application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for.—An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. (Oct. 22, 1913, c. 32, § 1, 38 Stat. 220.)

47a. (*Judicial Code, section 210.*) *Appeal to Supreme Court from final decree; time for taking; priority.*—A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the notice required shall be served upon the defendants in the case and upon the attorney general of the State. The district court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse, or modify as the case may require, the final judgment or decree of the district court in the cases specified in section 44 of this title. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such

form and of such amount as the Supreme Court or the justice of that court allowing the stay, may require. Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court. (Mar. 3, 1911, c. 231, § 210, 36 Stat. 1150; Oct. 22, 1913, c. 32, § 1, 38 Stat. 220.)

United States Code, Title 28, Section 382

Same; security on issuance of. Except as otherwise provided in section 26 of Title 15, no restraining order or interlocutory order of injunction shall issue, except upon the giving of security by the applicant in such sum as the court or judge may deem proper, conditioned upon the payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby. (Oct. 15, 1914, c. 323, § 18, 38 Stat. 738.)

(9951)

SUPREME COURT OF THE UNITED STATES.

No. 221.—OCTOBER TERM, 1938.

The United States of America and the
Secretary of Agriculture, Appel-
lants,

vs.

F. O. Morgan, doing business as F. O.
Morgan Sheep Commission Com-
pany, et al.

Appeal from the District
Court of the United
States for the Western
District of Missouri.

[May 15, 1939.]

Mr. Justice STONE delivered the opinion of the Court.

On this appeal we are asked to determine the proper disposition to be made of a fund paid into the court below pending a suit instituted in that court to set aside an order of the Secretary of Agriculture reducing scheduled rates for services rendered at the Kansas City stockyards. The fund is made up of the difference between the scheduled rates and those prescribed by the Secretary's order, which was ultimately set aside by this Court in *Morgan v. United States*, 304 U. S. 1, without consideration of the merits, for failure of the Secretary to follow the procedure prescribed by the statute.

On June 14, 1933, the Secretary of Agriculture promulgated an order under the Packers and Stockyards Act, 1921, 42 Stat. 159, 7 U. S. C. §§ 181-229, setting aside a schedule of maximum rates to be charged for stockyard services, filed by market agencies at the Kansas City stockyards, and prescribing a new and lower rate schedule for the future. In a suit brought in the district court for western Missouri by appellees, conducting market agencies at the Kansas City stockyards, to set aside the order as confiscatory and as having been rendered without procedural due process, the court on July 22, 1933, entered a temporary restraining order enjoining enforcement of the Secretary's order upon condition that appellees should:

"deposit with the Clerk of this Court on Monday of each and every week hereafter while this order, or any extension thereof, may re-

main in force and effect and pending final disposition of this cause, the full amount by which the charges collected under the Schedule of Rates in effect exceeds the amount which would have been collected under the rates prescribed in the Order of the Secretary, together with a verified statement of the names and addresses of all persons upon whose behalf such amounts are collected by petitioner."

After two appeals we reversed the final decree of the district court, which had sustained the order of the Secretary. This Court held that he had not accorded to appellees the "full hearing" which § 310 of the Act requires, and, without considering the merits, it remanded the cause for further proceedings. *Morgan v. United States*, 298 U. S. 468; 304 U. S. 1. A petition for rehearing, in part on the ground that the mandate of this Court had made no provision for the distribution of the fund paid into the district court pursuant to its restraining order, was denied in a memorandum opinion stating that the questions raised were appropriately for the district court, to which the cause had been remanded for further proceedings. The opinion added:

"We remand the case to the District Court for further proceedings in conformity with our opinion. What further proceedings the Secretary may see fit to take in the light of our decision, or what determinations may be made by the District Court in relation to any such proceedings, are not matters which we should attempt to forecast or hypothetically to decide." 304 U. S. 23, 26.

By this remand the Secretary was left free to take such further proceedings as the statute permits. *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 238-239; *Southern Railway Co. v. St. Louis Hay & Grain Co.*, 214 U. S. 297, 302; *Florida v. United States*, 292 U. S. 1, 9.

The Secretary thereupon, by order of June 2, 1938, reopened the original proceedings which had resulted in the challenged order of June 14, 1933. He directed that the "Proceedings, Findings of Fact, Conclusion, and Order" of June 14, 1933, be served upon the appellee market agencies as his tentative findings and order, with an opportunity for appellees to file exceptions to them and to make oral argument upon the exceptions. This action was followed, June 11, 1938, by the present proceeding, begun by motion of appellants in the district court to stay further proceedings there and to direct the clerk of the court to retain the impounded funds until such time as the Secretary, proceeding with due expedition, should have entered a final order in the proceedings reopened by

him. This motion was denied, and from the order of the district court granting a counter-motion by appellees to distribute the fund among them, the case comes here on appeal.¹ § 316 of the Packers and Stockyards Act, 42 Stat. 168, 7 U. S. C. § 217; 38 Stat. 220, 28 U. S. C. §§ 47, 47(a); § 238(5) of the Judicial Code, 28 U. S. C. § 345(5). This Court has stayed and superseded the order of the district court pending appeal. October 10, 1938.

The district court held that the fund should presently be distributed to appellees, both because the Secretary is without authority under the Act to make any order prescribing rates and charges which will be effective as of June 14, 1933, the date of his original order, and because it construed the terms of its own restraining order as requiring distribution of the fund to appellees on the final determination by this Court that the Secretary's order of June 14, 1933, was invalid. Thus, as a result of the litigation, the district court has twice sustained the determination of the Secretary that the rates prescribed by him, on the basis of voluminous evidence, were reasonable; but because of this Court's decision that the Secretary had failed to observe the statutory requirement of a full hearing, we have never reviewed that determination. The question now arises whether upon a redetermination of that issue by the Secretary the district court will have, and should exercise, the power to order distribution of the impounded fund in conformity to his determination by directing that so much, if any, of the amounts paid into court as exceeds the rates ultimately determined upon appropriate review of the Secretary's findings to be just and reasonable be returned to those who have paid them. This issue must be decided now, for unless the court will have such power there is no occasion to retain the fund pending further proceedings before the Secretary, and distribution of it must be made as the district court has directed.

Decision turns on the meaning and application of the provisions of the Packers and Stockyards Act, construed in the light of its dominant purpose to secure to patrons of the stockyards prescribed

¹ On the same date the district court entered a decree on the mandate of this Court setting aside the Secretary's order of June 14, 1933, and permanently enjoining its enforcement. In that decree the district court retained jurisdiction and decreed that "such other proceedings be had herein in conformity to the opinion of said Supreme Court with reference to the distribution or restitution of funds deposited by plaintiffs in the Registry of this Court with the Clerk thereof pursuant to the provisions of the temporary restraining order entered on the 22nd day of July 1933 as to law and justice may appertain".

stockyard services at just and reasonable rates, and upon the authority and duty of the district court to effectuate that purpose in making disposition of the fund. Section 304 of the Act requires every stockyard owner and market agency to furnish non-discriminatory and reasonable stockyard services, and § 305 declares that "All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and non-discriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful". Section 307 makes a like requirement as to regulations and practices in respect to furnishing stockyard services. Section 306 makes it the duty of stockyard owners and market agencies to file with the Secretary a schedule of rates for stockyard services and to charge and collect such rates, unless they are set aside by appropriate action of the Secretary or changed by the filing of new rates as authorized by the section. Section 308(a) provides that any stockyard owner or market agency violating any of the previously mentioned sections shall be liable to the persons injured to the full extent of the damage sustained. Section 308(b) provides for enforcement of such liability either by complaint to the Secretary or by suit in any district court, and concludes with the declaration that "this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." Section 310 authorizes the Secretary "after full hearing" on complaint, or on his own initiative, to prescribe just and reasonable rates for the future.

Appellees insist that notwithstanding the command of § 305 that all rates shall be "just, reasonable, and non-discriminatory", its mandate is effective only so far as implemented by the other sections of the Act; that except in a reparation case the statute forbids the Secretary to make orders affecting completed transactions, and that acting on his own initiative, as he does here, he can fix rates for the future only. They point out that under § 309(a) and (e) and § 310, any person aggrieved may, on petition to the Secretary, seek damages for the exaction of an unreasonable rate in the past, the naming of a new rate for the future, or both, but that when the Secretary institutes such proceedings on his own motion he is precluded by § 309(c) from making any order for the payment of money. As the original proceeding here and the action of the Secretary in reopening it were taken on his own motion, the conclusion is drawn that there can be no legal warrant for restitution of the impounded moneys to the patrons of the market agencies.

even though the Secretary shall now determine, on evidence and by proper procedure, that the scheduled rates exceeded the reasonable rates prescribed by § 305.

Even though the premises be accepted as in all respects sound, the conclusion does not follow. There is here no question of the Secretary's making an order for the payment of money. The fund having been taken into custody of the court, in consequence of its order restraining the operation of the rate schedule prescribed by the Secretary, the questions for our decision are whether the district court, in the discharge of the duty which it has thus assumed as a court of equity, can rightly dispose of the fund without regard to the command of § 305 if the Secretary shall determine that the rates exacted by aid of the court, and paid into its registry, are excessive; and whether, in the exercise of its discretion, the court should retain the fund until such time as the Secretary, proceeding with due expedition, shall make his final determination and order.

In answering these questions there are two cardinal principles which must guide us to our conclusion. The one is that in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice;² neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim. The other guiding principle is that in reviewing the action of the Secretary and in similarly reviewing the action of the Interstate Commerce Commission in conformity with the provisions of the Urgent Deficiencies Act, the district court sits as a court of equity, see *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364, 373; *Inland Steel Co. v. United States*; — U. S. —; and in exerting its extraordinary powers to stay execution of a rate order, and in directing payment

² See Y. B. 22 Ed. IV. Mich. pl. 21; *Heath v. Rydley*, (1614) Cro. Jac. 335;

¹ Holdsworth, *History of English Law*, 459-465.

into court of so much of the rate as has been found administratively to be excessive, it assumes the duty of making disposition of the fund in conformity to equitable principles.

Assuming, as appellees contend, that after the Secretary's order of June, 1933, was set aside he could, in the reopened proceeding, neither promulgate a rate order as of that date nor make an order for the payment of money, he was still not without authority in the premises under the statute and the mandate of this Court. He was free to make an order fixing rates for the future, and for that purpose or any other within the purview of the Act he is now free to determine a reasonable rate for the period antedating any order he may now make. See *Atlantic Coast Line R. Co. v. Florida*, 295 U. S. 301, 312. No prior decision of the Secretary stands in the way of his making the determination now. Cf. *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Railway Co.*, 284 U. S. 370. The sole limitation upon his power, prescribed by § 309(c), is that upon an inquiry instituted by him he may not order the payment of money. In other respects his power to investigate and decide is unaffected.³ He may make inquiry "as to any matter or thing concerning which a complaint is authorized to be made" to him, "or concerning which any question may arise under any of the provisions" of the Act, "or relating to the enforcement of any" provision. He is given "the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money." § 309(c).

That the Secretary, acting under § 309(a), could now entertain a complaint by the patrons of appellees who have contributed to the fund in court charging that the rates exacted were in violation of § 305, seems to be conceded and is, we think, plain. Section 309(a) specifically provides: "If . . . there appears to be any rea-

³ § 309(c): "The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of this title, or concerning which any question may arise under any of the provisions of this title, or relating to the enforcement of any of the provisions of this title. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money."

sonable ground for investigating the complaint, it shall be the duty of the Secretary to investigate the matters complained of in such manner and by such means as he deems proper". It seems equally plain that under § 309(c) the Secretary, in the exercise of his discretion, may conduct such an investigation on his own motion. Ordinarily, it is true, there would be no occasion for such an investigation if, as a result of it, the Secretary could make no reparation order. But, as we shall presently point out, when the alleged excessive rates are in *custodia legis*, the court has authority and is under an equitable duty to dispose of them according to law and justice. Thus the Secretary has the best of reasons to exercise his power to determine whether the rates were reasonable and may rightly do so, if his determination can afford a proper basis for the action of the district court in making disposition of the fund.

The district court, in staying the Secretary's order and at the same time arresting the excess payments to appellees under the scheduled rates, assumed the duty of making the proper disposition of the fund upon the termination of the litigation. The duty was the more imperative here because the court's injunction order not only deprived the public of the benefit of the lower rates but obstructed any effective reparation order by the Secretary. Its action presupposed that the ownership of the excess payments was in doubt and could be finally determined only by an adjudication on the merits of the reasonableness of the filed rates. In taking the payments into custody it acted as a court of equity, charged both with the responsibility of protecting the fund and of disposing of it according to law, and free in the discharge of that duty to use broad discretion in the exercise of its powers in such manner as to avoid an unjust or unlawful result. It entered into no contract or understanding with the litigants; it entered into no undertaking as to the manner of disposing of the fund; its duty with respect to it is that prescribed by the applicable principles of law and equity for the protection of the litigants and the public, whose interests the injunction and the final disposition of the fund affect. *Inland Steel Co. v. United States, supra*.

It is familiar doctrine that the extent to which a court of equity may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved. *Central Kentucky Gas Co. v. Railroad Commission*, 290 U. S. 264, 271; *Pennsylvania v. Williams*, 294 U. S. 176, 185; *Virginia Railway Co. v. Federation*, 300 U. S. 515, 552 *et seq.* Congress having by the

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Packers and Stockyards Act established the public policy of maintaining reasonable rates for stockyard services, and having prohibited and declared unlawful any unjust or unreasonable rate, a court of equity should be astute to avoid the use of its process to effectuate the collection of unlawful rates, and equally so to direct it to the restitution of rates which it has taken into its own custody, once they are shown to have been unlawful. If such a determination had already been made by the Secretary in the proceeding before him, after full hearing, and if it were found by the district court to be supported by evidence, the duty of the court to make restitution forthwith would seem evident, notwithstanding the absence of any order of the Secretary directing the payment. *Inland Steel Co. v. United States, supra.*⁴ The Secretary, as we have seen, is authorized to make the determination. Section 305 denounces unreasonable rates as unlawful. The statute, as declared by § 308(b), saves to the court authority to give any remedy which in the present circumstances it might otherwise afford.

This Court went much further in *Atlantic Coast Line R. Co. v. Florida, supra*, in denying, on equitable grounds, restitution to shippers of the excess of an intrastate rate, prescribed by order of the Interstate Commerce Commission to avoid discrimination against interstate commerce, over that prescribed by the state commission, where the order of the former was later set aside by this Court for want of proper findings by the Commission. Upon further proceedings before the Commission it made a second order, upon proper findings of discrimination, establishing the rate as before. The final result of the litigation was that the railroads were permitted to collect and retain the higher rates for a period

⁴ In *Inland Steel Co. v. United States*, — U. S. —, the Interstate Commerce Commission had ordered certain railroads to cease the payment to shippers, in conformity to a filed tariff, of switching charges which the Commission had found to be unlawful. On review of the action of the Commission the district court stayed the Commission's order and directed the railroads, pending final disposition of the cause, to place further payments due under the tariff in a special fund to be held subject to the order of the court. The Commission's order was ultimately sustained, but meanwhile the Commission, pending review in the courts, had postponed the effective date of its order, so that during the litigation there was no operative Commission order forbidding the unlawful payments. This Court rejected the contention of the shippers that the fund must be paid over to them because it was accumulated in the absence of a controlling order of the Commission. We held that it was the duty of the district court, resulting from its injunction and its control over the fund, to make equitable disposition of it, and we sustained the district court's order that the fund should be turned over to the railroads in conformity to the Commission's determination, confirmed on judicial review, that the switching allowances were unlawful.

during which there was no lawful order of the Commission superseding the state commission rates. There, as here, the administrative agency could prescribe rates only for the future, and the higher rates exacted between the date of the first order and the second were without the sanction of a valid order. But there, as here, the first administrative order was not a nullity. *Ewell v. Daggs*, 108 U. S. 143, 148, 149; *Weeks v. Bridgman*, 159 U. S. 541, 547; *Toy Toy v. Hopkins*, 212 U. S. 542, 548. Though voidable, it could not be ignored without incurring the penalties for disobedience inflicted by the applicable provisions of the statute. The rates did not lose their unjust and unreasonable quality in the one case, or cease to be unjustly discriminatory in the other, merely because the administrative orders in each were voidable for procedural defects or because a second order could operate only for the future. In each case the administrative agency was not without power to inquire whether injustice had been done by the earlier rate, and the court, called on to ascertain, according to equitable principles, the rights of the parties with respect to payments made under the voidable order, could take into account the subsequent determination of the administrative agency as the basis of its action. *Atlantic Coast Line R. Co. v. Florida*, *supra*, 312-313, 317; *New York Edison Co. v. Maltbie*, 244 App. Div. (N. Y.) 436; *Brooklyn Union Gas Co. v. Maltbie*, 245 App. Div. (N. Y.) 74.

It is said that the distinction between this and the *Atlantic Coast Line* case is the distinction between judicial inaction and judicial action; that there the court, upon settled equitable principles, was free to refrain from compelling restitution if satisfied that no injustice had been done, see *Tiffany v. Boatman's Institution*, 18 Wall. 375, 385; *Mississippi & M. R. Co. v. Cromwell*, 91 U. S. 643, 645; *Deweese v. Reinhard*, 165 U. S. 386, 390, but that here the court is called on by appellants to act by withholding from appellees rates which are still lawfully in force because the filed schedule has not been set aside by a valid order of the Secretary. While at the moment appellants are content with inaction, and it is appellees who are demanding action—the payment to them of rates whose lawfulness is challenged and not yet determined—the actual posture of the case is such that the court is under a self-imposed duty to act by virtue of having taken the fund into its possession, and in acting to dispose of the fund it must conform to controlling legal principles. Reasonableness of the rates was not

established by the filed schedules. Had the rates collected been paid to appellees instead of to the clerk of the court, the Secretary could have ordered reparation upon proper findings that they were unreasonable. And the question is whether the court must now, in the face of a proceeding by the Secretary to determine the reasonableness of the challenged rates, use its power to complete their collection at the risk of obstructing reparation, or whether it should itself remain inactive until their lawfulness is determined and then act accordingly.

It is a power "inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process". *Arkadelphia Co. v. St. Louis Railway Co.*, 249 U. S. 134, 146. See *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 219. What has been given or paid under the compulsion of a judgment the court will restore when its judgment has been set aside and justice requires restitution. *Northwestern Fuel Co. v. Brock*, *supra*; *Ex parte Lincoln Gas & Electric Co.*, 257 U. S. 6; *Baltimore & Ohio Railway Co. v. United States*, 279 U. S. 781. And where by its injunction a court has compelled payment into its registry of amounts which may in pending proceedings be found not to have been due from those who paid them, we think justice equally requires the court to await the outcome of the proceedings in order that it may discharge the duty which it owes to the litigants and the public by avoiding unlawful disposition of the fund in the meantime, and ultimately distributing it to those found to be entitled to it. See *New York Edison Co. v. Maltbie*, *supra*; *Brooklyn Union Gas Co. v. Maltbie*, *supra*; cf. *United States v. Klein*, 303 U. S. 276.

A proceeding is now pending before the Secretary in which, as we have seen, he is free to determine the reasonableness of the rates. His determination, if supported by evidence and made in a proceeding conducted in conformity with the statute and due process, will afford the appropriate basis for action in the district court in making distribution of the fund in its custody. *Atlantic Coast Line R. Co. v. Florida*, *supra*, 312-313, 317. Due regard for the discharge of the court's own responsibility to the litigants and to the public and the appropriate exercise of its discretion in such manner as to effectuate the policy of the Act and facilitate administration of the system which it has set up, require retention of the fund by the district court until such time as the

Secretary, proceeding with due expedition, shall have entered a final order in the proceedings pending before him. Cf. *Mahler v. Eby*, 264 U. S. 32; *Top v. Waldman*, 266 U. S. 113. The district court will thus avoid the risk of using its process as an instrument of injustice and, with the full record of the Secretary's proceedings before it, including findings supported by evidence, the court will have the appropriate basis for its action and will be able to make its order of distribution accordingly.

Reversed.

Mr. Justice REED took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.



SUPREME COURT OF THE UNITED STATES.

No. 221.—OCTOBER TERM, 1938.

The United States of America and the
Secretary of Agriculture, Appel-
lants,

vs.

F. O. Morgan, doing business as F. O.
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pany, et al.

Appeal from the District
Court of the United
States for the Western
District of Missouri.

[May 15, 1939.]

Mr. Justice BUTLER, dissenting.

In proceedings instituted on complaint of shippers in 1922, the Secretary, July 27, 1923, approved a 15 per cent reduction of market agencies' charges. In May, 1932, the agencies filed tariffs, which were not challenged by shippers or suspended by the Secretary, making additional reductions of about 10 per cent. These rates remained in force until November 1, 1937. Then there became effective a new schedule established by agreement between the agencies and the Secretary. There being no question as to reasonableness of charges made since that date, the appellees were not required to continue making deposits to secure their compliance with the Secretary's order of June 14, 1933 challenged in this suit, and so impounding ceased.

The money on deposit in the district court is made up of amounts taken from charges as low as, or lower than, those so put and kept in force and applied until November 1, 1937. In the proceedings pending before him, the Secretary may not order reparation (See § 309. Also *Arizona Grocery v. Atchison Ry.*, 284 U. S. 370, 389) and is without jurisdiction to do more than prescribe charges to be applied after the effective date of that order if one shall be made. The challenged order having been adjudged invalid because made in violation of the Act (*Morgan v. United States*, 304 U. S. 1), the appellees immediately became entitled to the money that, in pursu-

ance of the restraining order, was deposited in court by them to secure their compliance with the Secretary's order if found valid. The record contains nothing to support the idea that the pledge was for any other purpose, or to justify or excuse withholding it for another use. For the reasons stated in its opinion, 24 F. Supp. 214, the district court rightly held appellees entitled to have their money returned to them. Its decree should be affirmed.

Mr. Justice McREYNOLDS and Mr. Justice ROBERTS join in this opinion.

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